



JOHN DOE and RICHARD ROE BROTHERS IN LAW !!

[From an XVIIIth Century Print.]

JOHN CITIZEN
AND
THE LAW

By
RONALD RUBINSTEIN



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THIS BOOK

is dedicated in particular to my wife,
and in general to all those who
conscientiously read and digest the
Preface before they commence on
Chapter I

NOTE

John Doe and Richard Roe,
who figure prominently throughout
the work, and whose portraits
appear in the frontispiece, are ficti-
tious legal characters who have
been dead for nearly a century and a
brief account of their life history is
given in an Appendix

Acknowledgments

In addition to assistance given to me by members of my family (particularly my niece, Miss Joan Rubinstein), I desire to express grateful appreciation for the valuable help given or suggestions made to me by the following: Mr. W. P. Allen, Mr. J. F. Beer, Miss L. Binning, Mr. Bertram Cecil, Mr. R. A. Clark, Mr. Herbert Cremer, Mr. J. W. Goldman, Mr. Milner Holland, Mr. Claude Hornby, Mr. H. C. Leon, Mr. Harold Lightman, Mr. T. G. Lund, Lord Meston, Mr. A. F. Pullinger, Miss M. R. Rawlinson, Mrs. A. B. Rossiter, Mr. Harry Rubens, Mr. D. Sacker, Mr. W. A. Steiner, Miss I. Trish, and Mr. R. E. Williams

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PREFACE

“What is the use of a book,” thought Alice,
“without pictures or conversation?”

Alice in Wonderland

‘JOHN DOE murdered. Man detained.’ These arresting words catch the attention and excite interest.

‘Be it enacted by the King’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows. . . .’ These pompous and stilted phrases will attract nobody, and yet they introduce topics which will have a far greater effect on your daily life than the murder of John Doe, for they are the preamble to every Act of Parliament.

In this book I am anxious to excite interest in the law because I believe it to be to the advantage of the community for each member to know something of the rules and regulations by which he is governed—a matter which normally arouses no interest, but is simply considered tedious.

This is not a book for lawyers, and I am fully conscious of the peril of an attempt to divulge legal magic to anyone who has not been trained in the subject. Indeed, lawyers may consider the book a menace, and it may well prove to be if it is misused. On the other hand, the dangers of ignorance and the injury you may individually suffer as a result of the total lack of knowledge of basic legal principles satisfy me that the effort is worth making. It is always pleasant to draw back the curtains in order to let in the light. However, I must give a preliminary caution in language which admits of no ambiguity and which cannot be misunderstood. You must not for one moment think that ‘Every man his own legal Adviser’ would be a suitable alternative title for this book. I would rather that the alternative title should be ‘Why is this the Law?’ for I have endeavoured in many instances to explain the reason why particular rules are made in particular cases. You must not commit the folly of

believing that the book will give you the exact answer to your particular legal problem, or the best solution to any legal difficulty with which you may be faced, for even the Lawyer's Encyclopædia called 'Halsbury's Laws of England,' consisting of thirty-seven volumes, each of some 1,000 pages, may not be able to do this. Moreover, that work is only an introduction to law, which refers you in each instance to the particular Law or legal decision upon which the text is founded. If you want to know all there is to be known about English law you must refer to the relevant Acts of Parliament and the relevant legal decisions which are contained in many thousands of volumes of Statutes and Law Reports. The matter does not even end there, for the complexities of our daily life produce problems to which there is no certain solution—a fact for which the lawyers are usually blamed—but that is a subject which I do not propose to pursue in this introduction.

It is unfortunate that any outline of English law (and this book deals only with the law in England and Wales, as distinct from Scotland) is bound to make liberal use of generalisations. Generalisations are, as a rule, very dangerous and very objectionable. They may be gunpowder in the hands of the unwary. They are safe only when they are recognised and approached with caution. In order to emphasise this point, may I say that neither the publisher nor the author will accept any responsibility if any foolhardy reader attempts to act on a decision at which he arrives by treating any generalisation as applicable to the facts of his particular case. Rash and hazardous enterprise of this character is not to be encouraged. This volume gives you a sketchy outline of the law, and nothing more. Compare yourself with the man who is ignorant of the nature of the solar system and the stars. If he purchases a small telescope he will only gain very limited knowledge of the universe. Even large telescopes will fail to uncover more than a fragment of the galaxy of stars in the firmament. You may regard this work as a small telescope which may be focused on some of our day-to-day legal problems. It cannot pretend, how-

ever, to disclose more than a small segment of the legal system.

One thing is certain. A legal system, a respect for that system, and a reasonable certainty that it will be administered impartially, and without political prejudice, is essential to any civilised community. There are doubtless features of the English legal system which are petty and obstructive, and the fractious individual, who believes that Freedom means the right to snatch and grab what he wants, without consideration for the rights of others, is always ready to seize on them as an example of the tyranny of the law. Generally speaking, however, the English system is reliable and 'not so bad', and history has always proved that the absence of a reliable legal system means chaos and jungle law.

Of course, I am guilty of special pleading when I praise the law. My pride in the law is not, however, charged with complacency as to its imperfections. Nothing human ever is perfect, and I will gladly associate myself with any constructive proposals for improvements, bearing in mind that when a law meets the needs of 99.9 per cent. of the community, but operates harshly on ten, a hundred, a thousand, or even ten thousand individuals, *i.e.*, 1 in 40,000 of the population of England, there may not be adequate ground for revision, if the proposed alterations will do more injury than they cure.

'Law enters into nearly every relation of social and civic life from birth to death.' Bearing the cautions of this preface in mind, we shall be able in the following chapters to test the truth of this assertion, but you must be prepared to find that 'the tune is unfamiliar, and the end a note of interrogation.'

October 1946.

WHAT IS LAW?

'O great and sane and simple race of brutes,
That own no lust, because they have no law.'
Tennyson

LAW has been defined as 'the just interference of the State in the interests and passions of humanity'. It will hardly be seriously disputed that it is necessary for the State to interfere in the affairs of the community to a greater or lesser degree, since community life would be a sad tangle if there were no laws or rules which had to be observed by all.

The average schoolboy will admit that his school would never function successfully without rules, and most boys prefer rules to be laid down with precision, for the more exact the definition, the better the boy understands his place in the school and the duties and obligations which he has to observe. Rules also help him to understand the meaning of co-operation, and even in schools which cater for the individual ego there is some limit to the latitude allowed to the children. They are not, for instance, permitted to murder their masters, or to set fire to the school buildings. As a rule, the guiding principle of such schools is that a child is entitled to freedom, so long as he does not abuse that freedom by injuring others, but it is doubtful if a narrow interpretation and the absence of discipline help the child to understand the importance of co-operation, as distinct from rugged individualism.

It seldom occurs to anyone that when children have left school it is equally desirable for them to learn something of the rules which govern community life. They are rarely instructed as to what they may or may not do, and they are usually ignorant of the procedure laid down for the adjustment of disputes between individual members of the community. Although, however, they know little or nothing of these rules, they rarely hesitate to grumble at them, particularly when they realise how easily they are infringed. Yet the community has returned a Socialist Government to

power for the first time in English history, and it has not been intimidated by the threat that Socialism would add to the spate of rules and regulations which have poured almost daily from Government offices since 1939. The majority of us are, apparently, prepared to abandon a certain amount of freedom, because we realise 'controls' are essential to the reconstruction of the world, in much the same way as scaffolding is required in the erection of a new building. When the building is finished, the scaffolding may be removed, and when the world has been rebuilt we may hope for the removal of the present restrictive controls—but this does not mean that even then we can dispense with all our rules. For example, when you are out cycling after dark without a light, and a policeman stops you and lays his hand on your shoulder, you may be infuriated at this attack on your liberty. When, however, you appear in Court, a few days later, charged with the legal offence of cycling after dark without a light, you are not charged with this offence because the 'Government' is totalitarian or tyrannical. In fact, in a democracy, the 'Government' consists of the lawfully appointed representatives of the people. The Government will not object if you wish to career round your garden at night on a bicycle without a light, for in such a case you will only be a danger to yourself. It is, however, the duty of a Government to protect the community from the antics of irresponsibility. It is too late to remedy the disaster when a pedestrian is knocked down and killed by a cyclist riding at night without a lamp, so it is the duty of the Government to look ahead and endeavour to forestall accidents of this character. It therefore requires cyclists to carry lamps at night because it has a greater duty to safeguard the community as a whole than to respect the freedom of the individual.

If, in fact, everyone respected the rights of every other member of the community, we should not require any rule or law to deal with or punish crime. As, however, crime is in our marrow, it is necessary to define the exact nature of every criminal offence and prescribe the punishment to be exacted for breaking any particular rule. Even the dis-

appearance of crime would not, however, relieve the country of its obligations to make laws. We should still require rules to regulate our relations with each other. Rules are necessary in every phase of life, even if we are engaged only upon a game of ping-pong, although in such an event infraction of the rules may not involve legal consequences.

Many rules which involve legal obligations are made by Acts of Parliament, and they are then known as Statute Law. Statute-making became a regular practice in the thirteenth century. Before any rules derived from an Act of Parliament have the force of law to-day, the Government, or one or more Members of Parliament—*i.e.*, the House of Lords or the House of Commons—must present a Bill setting out the proposed rules in exact terms. The Bill must be read and approved three times in the House of Commons, and also in the House of Lords, before it can receive the formal assent of the King. Thereafter it becomes law, and is placed upon the Statute Book. No law may be enacted without the direct or indirect approval of the House of Commons. As England is a democracy, and the Members of Parliament who constitute the Government are elected by the people, such laws may be said, accordingly, to represent the will of the people.

Statute Law, however, is applicable to only some of the problems which arise in the daily contacts which take place between individual members of the community. When, therefore, a dispute is brought before a tribunal for decision, and there is no Statute Law applicable, the Judge must find his solution to the problem by other methods. After he has heard all the relevant facts, he must consider what recognised legal principles are to be applied before he delivers his judgment. When a judgment is given in the High Court of Justice, a branch of the Supreme Court of Judicature in England, the judgment becomes almost invariably part of the law of the land, in the same way as a Statute. It is then known and described as part of the 'Common Law'. Common Law is therefore of an entirely different character from Statute Law, and the Common Law dates back to the

Middle Ages, when Courts of Law were first firmly established in this country. From the outset, cases came for trial before the Courts which could not be decided by reference to any law on the Statute Book. For the sake of convenience, it therefore became the practice when a Judge delivered his judgment for such judgment to become what is called a 'precedent', and in this way the Common Law was built up on precedent. In any other case which involved similar facts the Judge who tried it had to deliver a similar judgment. To-day every Judge is bound by precedent, and when a judgment is delivered in the House of Lords—the final appeal tribunal of the country—only Parliament, by the enactment of a new Statute, can re-make the law on the point in question. Frequently, in fact, laws are enacted which codify the existing Common Law, but many cases which are tried in the English Courts are still decided by the application of the principles of Common Law. The expression 'Common Law' is, accordingly, habitually used by lawyers to distinguish a class of case which is almost exclusively founded on 'precedent' as distinct from Statute Law, but the Common Law may never override Statute Law.

There is one other source which has greatly enriched our English legal system. It is known as 'equity'—*i.e.* 'right' or 'justice'—but we shall not stop to consider it here, because it lost much of its importance over seventy years ago with the passing of the Judicature Act 1873. Lawyers still speak of 'equity' and the 'equitable jurisdiction' of the Courts, and a note on the subject is included in an appendix, for it has had such a powerful influence on legal history that no outline of English law could properly exclude a reference to the subject.

What does the average citizen mean when he says he is 'going to law'? He means that he intends to invoke the assistance of the Courts, in order to assert what he believes to be his legal rights. Since everyone is bound by the law, everyone is entitled to ask for its assistance against a defaulting member of the community.

A man goes to law because he believes the laws are fairly

administered, and, subject to all-too-many human imperfections, he is not far wrong. He may rest assured that his complaint will be listened to with care. He will not run any serious risk of being told that he is in the wrong, because of political or other improper influence. He will receive a fair trial, and the strict impartiality with which his complaint will be heard and considered is the foundation upon which the whole of our present ordered structure rests.

If this were not so, the result would be disastrous. Indeed, you would not bring an action—the technical way of ‘going to law’—unless you felt assured of an impartial hearing of your case. You would not be so foolish as to waste your time and money, if you thought the result could be influenced by bribery or corruption, or if you feared that politics would enter into the case. You would in such circumstances hold the legal system in contempt. What, then, would be the result if you had no legal remedy for an injustice? Swindlers, already a burden on the community, would multiply in the same way as other rats. Most of them, at present, still act with a certain caution and respect for the law, but if they realised they could break agreements or commit fraud without fear of the consequences, all observance of the law would immediately cease. Under such conditions civil administration would collapse, and would be followed by unrestricted crime. When I can punch your nose with impunity because you are weaker than I am, and when a felon can break into a house and steal without risk, it follows that the thugs will do exactly as they please. When there is no punishment and no retribution, thieves and bullies will assume full control of the activities of the community. Nazi Germany provided an outstanding example of this calamity. After 1933 a Judge was rarely allowed to adjudicate any dispute on its merits. He was compelled to give his decision according to the interests of the Nazi State. Unless the claimant was a National Socialist, he had no legal rights. Many German Judges would not accept these conditions, and they were compelled to resign. Others were at once appointed in their place, because Hitler could retain control only so long as the Judges were willing

to carry out his instructions. 'Racks, gibbets and halters were their arguments', and if a German Socialist or a German Jew had been entitled to a fair trial of his complaint on its merits, there would have been a speedy end to the Nazi regime. A strong and impartial judicial system is the first essential in any country which makes claim to be recognised as a civilised community.

Why, then, do people so often scoff at the law? There are, no doubt, a variety of reasons; but, of these, ignorance predominates. Very few people are able to appreciate the problems involved in their true perspective, and are far too tempted by the attractions of exaggeration. They will refer you to cases in which the law has been abused, or a criminal has escaped detection or conviction, and they will cite these cases as examples of the futility of the law. Alternatively, perhaps, they will give you particulars of cases of injustice, which are true and deplorable, and they will use these instances to prove our legal system is worthless. They fail, utterly and entirely, to recognise that the law in England has to cope with a population which exceeds 40,000,000 individuals. If 400,000 of these suffer from some injustice in a greater or lesser degree, it represents less than 1% of the population, and it leaves 99% of the people in a position to benefit from the protection given to them by the law. Far be it from me to be complacent at injustice to 400,000—if this number were accurate. It is a terrifying total when each figure represents a human soul. On the other hand, lawyers are not superhuman, and do not claim to be so. They are not immune from the general shortcomings of mankind. The problem involved in the endeavour to make rules which are to be sufficiently flexible to be just to every member of a community of over 40,000,000 individuals is beyond human capacity. Our best efforts are bound to fall far short of perfection.

The machinery of law has, in fact, changed beyond all recognition in the past hundred years. It has moved with the times and has been modernised, and even although it still has so many imperfections, there is a genuine desire

among the majority of lawyers to remove impediments to justice and to assist in providing legal machinery adequate to the involved needs of modern life. Justice must, however, always be uncertain, however lofty our intentions may be. Every Judge is himself John Citizen, a member of the community, and he is subject to the same limitations of human intelligence, and has all the failings of our common lot. Two Judges may honestly arrive at two different opinions on identical facts. No man can say which of them, if either, is right. For this reason, even trained lawyers are unable to forecast the result of a lawsuit. It is made more uncertain, since no one can say exactly what evidence will be given by the opposing witnesses when they testify in Court, nor does anyone know how the Judge will react to the evidence of each witness. It is not the function of a Judge to decide a legal question until after the facts have been presented and analysed. Facts enable you to form a judgment, but as your neighbour's reaction to any given facts may be totally different from yours, you may each arrive at a totally different judgment.

You may be convinced in your mind that you performed a certain act on a certain day. If you are involved in litigation, and you give evidence to prove this fact, you may testify with complete honesty. Later, when your opponent gives his version of the case, he may tell a convincing story which is quite different from yours. This may not be due to any deceit on his part. He may feel as convinced as you do that he is telling the truth. The result, however, is that the Judge is confronted with two sets of facts which bear little resemblance to each other. Nevertheless, he must deliver his judgment. Since he is human, he will, of course, accept the evidence of the witness who has made the better impression. If he prefers the evidence of your opponent, and you are the disgruntled loser, you may leave the Court murmuring that there is no such thing as justice. This is very human, but very unreasonable. There is a loser to every lawsuit, and although there are many dishonest people, the majority of actions are contested by parties each of whom believes

himself to be honest. When losers complain that it is the law which is at fault—that being the way of human nature—you learn of another reason why the law is unpopular. Many of those who hold the law in contempt never attempt to appreciate problems of this character, because critics are often as small-minded as those whom they criticise.

When you are willing to concede that the most honest legal system can never be infallible, you will the better understand the real purpose of this book, which deals with the legal obligations of members of the community, as well as their legal rights. An obligation is a duty, and whilst it is generally recognised that crime is a wanton breach of duty, we do not so readily realise the extent of our legal obligations in our ordinary day-to-day contacts with our fellows. As this book deals largely with these daily contacts, it will be more concerned with the civil, and less with the criminal branch of the law. When we appreciate the vital truth, that every legal right involves a legal obligation, many existing evils will disappear. If we ever realise that the real key to so many of our misfortunes is a failure to carry out these obligations, and a failure to observe the spirit as well as the letter of the law, we shall be on the way to Utopia. Nevertheless, this prospect places us in a predicament, for we shall only achieve such an ambition after our passions have become like the 'cold ash of an extinguished fire'. When that is achieved, we shall scarcely be justified in classing ourselves as 'human' beings, and Utopia may prove to be a dull affair.

LEGAL RIGHTS AND OBLIGATIONS

'Being asked the way to the Workhouse by a needy looking man, I gave him a shilling. Judge of my surprise, as a local preacher and life-long teetotaler, when he turned into the next "pub" into which I followed in a useless effort to get my money back. What were my legal rights?'

Letter in *John Bull*—quoted in 'This England'

THERE are many occasions when a man owes a duty—a legal duty—to others, engaged upon lawful pursuits, not to cause them harm or hurt by any negligent act, and every time you are in contact with another man either one of you may be guilty of a breach of that duty. It is, generally speaking, immaterial whether or not the breach of duty is intentional or unintentional. All men are answerable for the natural and probable result of every one of their actions. If, through lack of caution, you have failed to consider the effect which may follow from a particular act, and which would have been foreseen by a reasonable man, you may be legally liable for the consequences. If these consequences result in injury to another member of the community, you have committed a 'tort' (derived from the French word meaning 'wrong'), and when a tort has been committed, a claim for damages may be made by the injured party. Such a claim may sometimes be made, even if the aggrieved person is unable to prove that he has suffered 'special damage', as pecuniary loss is called. In such cases the law awards damages because it assumes that the very nature of the injury is bound to cause loss. In other cases it does so because no one is entitled to injure any other member of the community with impunity. The word 'injury' must not be taken in a literal sense as meaning physical injury. Every person who suffers damage to his person, his property, or his reputation as a result of an infringement of the law suffers a legal injury. Compensation may frequently be recovered for damage to property and to reputation, as well as for pain and suffering due

to physical injury. Many of these claims cannot be measured in actual money terms. It is for the Judge or jury to assess the amount which may reasonably be calculated to reimburse the injured party for the loss which he has suffered as a result of the tort. Some general aspects of the principles upon which damages may be assessed are considered at the end of this chapter, but there are also many cases when there is no legal remedy for a financial loss, because it is not the result of any breach of a legal duty. If, for example, you are engaged in trade, and another trader opens a similar business on adjoining premises, you will suffer financial loss, when he takes your customers from you. He does not, however, commit any legal wrong by his conduct, and the law, accordingly, will give you no remedy for your grievance.

A good picture of the meaning of a legal duty can be obtained if we examine the all-too-common case known to lawyers as a 'running down' case, when a pedestrian is knocked down by a car. Every motor-driver has a legal obligation not to drive 'negligently', and if his car has struck the pedestrian as a result of his negligence, he is guilty of a breach of this duty, and the pedestrian is entitled to compensation. It is, however, important to note—and there is considerable misconception on the point—that the driver is liable, and is only liable, if he has failed to comply with this legal obligation. Negligence is the crux of the matter, and if there is no negligence, there is normally no claim. Negligence in law is a failure, by the wrongdoer, to exercise the amount of care, in a particular case, which an average reasonable man would exercise in similar circumstances. The onus, or burden, of proving negligence is upon the person who makes the complaint. It is not necessary for a driver who injures a pedestrian to prove that he was not negligent. The law always assumes that everyone has acted lawfully until the contrary is proved. If, accordingly, you have been knocked unconscious in an accident, and remember nothing of it, and if you are unable to trace any witness of the accident, you will not ordinarily be able to recover compensation, because you will not be able to prove that the driver was

negligent. If, however, you remained fully conscious, you will be competent to give evidence as a witness in support of the allegation of negligent driving. If the driver denies his negligence—and he will usually do so—and if he claims that the accident was due to your own negligence or carelessness, your word is as good as his. If there is no other witness available, it will be for the Court to decide whether it will accept your evidence and reject that given by the driver. Remember, however, that if the driver's evidence is unsatisfactory, it will not necessarily enable you to succeed in your action unless your own evidence is convincing. The burden is upon you to PROVE that the driver was guilty of negligent driving. Facts can only be proved in a Court of law by evidence which is accepted by the Court as being the truth. Moreover, if you have yourself been negligent, and the accident has been caused partly by your own fault and partly by the driver's fault, and your negligent act was the proximate or decisive cause of the accident, you will not be able to recover full compensation. Indeed, a defence by a driver of 'contributory negligence' by the pedestrian, if established in Court, had always been a complete answer to a claim for compensation, until the passing of the Law Reform (Contributory Negligence) Act 1945, which came into force on the 15th June, 1945. This Act, which applied to all accidents occurring after that date, achieved a long-overdue reform, as it provides (in relation to accidents) 'where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage'. This is a revolutionary doctrine for lawyers who have been taught that a claimant was absolutely barred from recovering damages after an accident, if he had been guilty of contributory negligence. It brings the law into line, however, with the practice observed in the case of

claims arising as a result of collisions at sea, when damages have for long been apportioned according to the degree of responsibility of the parties to the accident.

Other considerations of law may also arise when a street accident occurs. If the driver was not himself the owner of the car, it may be necessary to consider if there was any legal relationship between the owner and the driver. In some instances an employer (whose relations to his employee generally are considered in Chapter 4) is liable for any tortious or wrongful act of his employee. One such instance occurs when the act is committed by the employee whilst he is lawfully carrying out his duty to his employer. In such a case the employer must bear the legal consequences of his employee's negligence. In other words, and in the case which we are considering, he will be liable if the employee is driving the car as part of his duty to his employer at the time of the accident. On the other hand, an employer is not, generally speaking, liable if the employee is engaged upon his own personal affairs at the time of the accident, or if he had taken out the car for a joy ride, and was driving it without authority.

If you are unfortunate enough to meet with an accident, you cannot, of course, know if the car is being driven by its owner or by an employee of the owner, driving it without authority. Nevertheless, until recently it might seriously have affected your prospect of recovering compensation if the driver had been negligent. In the one case you were entitled to look to the owner to reimburse you for your damage. In the other case you could only look to the driver, who might have been without financial resources. We shall note in the next paragraph that this is now of less importance than formerly.

Yet a third matter for legal consideration in every street accident is the relationship which exists between the driver or owner of the car on the one hand, and his insurance company on the other hand. The law requires every driver of a motor car to be insured against 'third-party risks'—*i.e.*, claims by members of the public for damages for negligence. Provided the driver was properly insured at the time of the

accident, the question as to whether or not he was the owner of the car has usually been academic. Prior to July 1st, 1946, however, the law which required a driver to be insured, did not automatically insure him. An organisation called the Motor Insurers' Bureau has, however, now been set up voluntarily by the insurance companies themselves to deal with the scandal of the uninsured driver. Accordingly, an injured party who is able to establish negligence against the driver of a car involved in an accident will receive the same compensation from the Bureau as he would have recovered if the driver had been properly insured. Proper notice (details of which are obtainable from every insurance company) must be given to the Bureau within a specified period after the accident.

If you wish to claim compensation after you have been involved in an accident, you do not ordinarily have any legal rights against the driver's insurance company. It is true that in cases in which the driver's policy is in order the compensation which may become payable, by compromise or under a judgment of the Court, will be paid to you by the insurance company. They will, however, make this payment to you because they agree with their policy-holder to do so by the terms of the contract or agreement with *him*, and not as a result of any legal obligation which is owing to *you*.

If the driver of a car which is in good running condition, and with a new set of tyres, suffers an unexpected burst which throws the car out of control, and it injures a pedestrian, the victim may not be entitled to recover compensation from the driver, because the accident is not *prima facie* due to the latter's negligence. There might be a possibility of recovering damages against the manufacturer of the defective tyre, for manufacturers are under the same legal obligation to members of the community as others. In order, however, to establish a claim the injured man would have to satisfy the Court that the manufacturer had been negligent in his process of manufacture, and also that the manufacturer could not reasonably have expected examination of the tyre to have been made by any middle-man or dealer—formidable propositions, which in most cases would be very difficult of proof.

Many think that the driver of a car should always be liable for an injury which he causes, whether it occurs through his negligence or otherwise, since a motor car is so often a menace. In support of their arguments, they point out, if they are learned in the law, that a person who owns, or has charge of a dangerous object, must not allow it to escape or break from his control. If he does so, he is liable for any damage which it causes, even without proof of negligence, and he will only be able to avoid liability if he satisfies the Court that the accident could not have been prevented, no matter what precautions had been taken, or, in truth, that it was an act of God. Be careful to note, however, that an act of God is a rare occurrence. Generally speaking, it applies only to acts which are unquestionably beyond human control, such as thunderbolts and earthquakes. It is no act of God when a motor car mounts the footpath, no matter what the cause may be, but even so, the driver is not necessarily liable, since a motor car is not, in fact, placed in the category of objects legally considered to be dangerous. There the matter rests until such time as the law is altered, and changes in the law are ultimately promoted by the votes of the community, and not by the lawyer.

A pedestrian must never forget that he is under the same obligation as the motorist to exercise care, and he must not meander across the roadway without regard to the safety of others. Careless pedestrians are frequently responsible for serious accidents, when cars swerve to avoid them. A 'jay walker' may be as dangerous as a car, and any jay walker who is responsible for an accident may be sued for damages. Indeed, there is always a possibility that careless acts which result in injury to others may give rise to a legal claim for damages. When we consider the number of mistakes which each of us makes every day of our lives, we must feel grateful that so few of our errors involve us in legal complications.

Before leaving this 'chapter of accidents', you may note that if an accident results in death, the representative of the estate of the deceased person (see Chapter 27) has the same right to recover compensation as if the victim had

survived. This is subject always to the obligation to prove negligence against the defendant, for if it is not proved, the claim cannot succeed, and no damages will be recovered.

So much, for the moment, for torts. The other important source of right and obligation, which is of a totally different character, is derived from express 'agreement' or 'contract'. For practical purposes, the two words may be regarded as synonymous.

Contracts are an incident of daily life, and many of us enter into them almost hourly. Frequently we may be quite unconscious of their existence, although if we analysed the facts which are construed by the law as amounting to a contract, we would understand the soundness of the reasoning. For example, every time you travel on an omnibus there is, in law, a contract between the bus company and yourself, for each of the three elements essential to every contract of this character is present and each of the parties looks upon the incident as a business matter. The three essential elements of every contract, other than contracts 'under seal', which are referred to later, are (1) an unconditional offer made by one party to the other, (2) an unconditional acceptance of the offer, and (3) 'consideration' to support the offer and the acceptance. Consideration is a token passing between the parties to bind the bargain, and it may be either in cash or in kind. Generally speaking, the law is not concerned as to the adequacy or inadequacy of the consideration in any particular case, as this is essentially a matter to be decided by the parties themselves. The law only has the right to interfere if the consideration is so small, or so excessive, as to give rise to a presumption of fraud. Consideration must, however, have direct reference to the bargain which is being made between the parties, and not relate to some past event. For example, if John Doe has voluntarily undertaken and completed some work for Richard Roe, which so pleases the latter that he tells John Doe that if he will call on the following day he will give him £5 in payment, John Doe could not sue Richard Roe if the latter subsequently changed his mind and refused to make the payment. The promise to pay would

not be enforced, as it was based on what is called in law 'past consideration'. The promise could only have been enforced as a contract if Richard Roe had agreed with John Doe, before the work was undertaken, that if John Doe would do the work, Richard Roe would pay him £5 for it, or if the work had been undertaken expressly at Richard Roe's request.

When you travel on a bus, the bus offers to carry you, you accept the offer by boarding the bus, and the price which you pay for your ticket is the consideration which gives a legal status to the bargain.

There are some dealings which might appear to give rise to a contract, although they do not, in fact, do so. This is particularly the case when the parties do not intend to bind themselves legally. For example, if you ask a friend to tea, for 'discussion of philosophy and investigation of subtleties', and he accepts your invitation and you buy some 'cakes and ale' for the occasion, you are not entering into a contract which involves a legal obligation. It is an incident of social life, and neither party intends legal consequences to arise from subsequent cancellation of the arrangement.

The terms of every contract are either express or implied. The express terms are those conditions which are expressly agreed between the parties. The implied terms are those which are not expressly included. Except in cases in which an Act of Parliament deems terms to be implied in a contract, Courts are always slow to imply a term in a contract. They have no power to do so unless two conditions are fulfilled. Firstly, the Court must be satisfied that if both parties had been asked to include the term when the contract was made, they would both have agreed that such proposed term was essential to their bargain. It may frequently be said that it would have been 'reasonable' to include a certain condition, but this will not be sufficient. Secondly, it is necessary to satisfy the Court that the implied term is required in order to give efficacy to the contract, and that the contract would be incomplete without it. For example, when a visitor to a Turkish bath was injured by the collapse of a couch on which he was reclining, he was awarded damages for breach

of contract. Although it was not an express term of the contract that the couch should not collapse, the Court drew the inference from the facts, that if the matter had been previously discussed between the parties, both would have agreed that a couch supplied to bathers should unquestionably be fit to lie on. The Court accordingly decided that both the essential conditions had been fulfilled, and they treated the misfortune as being the breach of an implied condition of the contract, awarding the bather damages for the injuries which he had sustained.

There is a widespread belief that a contract has no legal significance unless it is in writing. This opinion is, as a general rule, erroneous. Certain classes of contracts, which are dealt with in the next chapter, have to be in writing, but in other cases the phrase 'his word is as good as his bond' may be legally true.

When two parties negotiate as a preliminary to a bargain, there will be no contract between them until one party makes an unequivocal offer which is unconditionally accepted. For example, if John Doe offers in writing to sell Richard Roe a house for £1,000, there will be no contract if Richard Roe agrees to buy the house 'subject to a surveyor's report'. If this condition is imposed, neither John Doe nor Richard Roe is under any legal obligation to the other; for the acceptance is not unequivocal.

For the same reason, the law will not enforce an agreement to make an agreement. If John Doe accepts an offer of £1,000 made by Richard Roe for the house, but adds words to a receipt given for the deposit, that the acceptance is 'subject to an agreement to be approved by his solicitors', there is no contract, and neither of the parties is under any obligation to the other, except as to a return of the deposit. When a purchaser is anxious to buy a particular house, it may frequently happen that he will willingly pay an estate agent a deposit of 10% of the purchase price in the belief that he has secured a legal right to the house. If, however, he looks closely at his receipt, he will usually find it contains the words 'subject to contract'. All he has agreed to do is

to enter into an agreement. The acceptance is not unconditional. The fact that he has paid 10% of the proposed purchase money has no binding effect.

If two parties intend to enter into a contract, there will, generally speaking, be no enforceable bargain if it subsequently appears that there has been a genuine confusion as to the identity of the object which was to be the subject of the bargain. This does not mean that John Doe will necessarily be relieved of his obligations if he makes a foolish mistake and agrees to buy a pedal cycle in the mistaken belief that he is purchasing a motor cycle. If he has acted in a way which will lead the vendor to believe that he is proposing to buy a pedal cycle, and the vendor, as a reasonable man, does, in fact, so believe, the law may hold John Doe to his bargain. The law may say that he is 'estopped' by his conduct from denying that he has agreed to the purchase. Estoppel is a doctrine which we shall meet in other chapters. It is applied on fixed principles to prevent a man from repudiating his own acts or conduct, when a stranger has relied upon them, and shaped his own conduct accordingly. In such a case, the law does not permit repudiation, because it would be inequitable or unfair to do so.

When a mistake arises in a written contract, it is a general principle that every man is assumed to have read and understood the document which he has signed. No one should ever sign any document unless he has read and understood the contents, for if a man is foolish enough to sign a document which binds him to buy a pedal cycle when he intended to buy a motor cycle, he cannot normally escape from the consequences of his folly. He may, however, be able to do so if he has been induced to sign the document by misrepresentation. If he has been told by the vendor that the latter had a first-class motor cycle for sale, and he is asked for his signature in order to clinch the bargain, he might be able to obtain rescission or cancellation of the contract from the Court if he has signed the document in the belief that the vendor's representation was true, and he had subsequently found that he had contracted for the purchase of a pedal cycle. Such

an action would normally be based upon fraud, a subject dealt with in Chapter 12. Analogous to such a case is that of 'duress' or 'undue influence'. A party enters into a contract under duress if he is compelled to do so under threat of physical violence, or even, in some cases, oppressive action short of actual threat. In such a case the contract may be avoided. 'Undue influence' arises when there is a special relationship, such as solicitor and client, or doctor and patient, between the contracting parties. In such instances, the Court may find that the power to dominate has been unfairly exercised, and the contract may be repudiated.

When a mutual mistake is made in reducing a verbal agreement into writing, or in recording the terms of an agreement, it is sometimes possible, when the error is discovered, to obtain 'rectification' of the contract—*i.e.*, the Court will order the document to be altered so as to represent the true bargain between the parties. It is, however, necessary to emphasise that the mistake must be a mutual one. It is not possible to obtain rectification of a contract when there is a mistake by one party only.

The damage you may recover for a breach of contract is such damage as flows directly from the breach. In the case of a tort a more generous measure is adopted, for the law will usually do its best to place the injured man in the same position as he would have been, if the tort had not been committed. After a fatal accident compensation may even include a sum to cover the loss of expectation of life. This is an extremely difficult figure to assess, and the Court is only permitted to award a 'very moderate' sum. 'Moderate' is a relative term, and the amount is not an assessment based on age, financial or social circumstances. The Court must consider the value of the loss of prospective happiness and in the case of a child the amount is reduced on account of the uncertainties of childhood. As a rule, sums of between £100 and £500 have been awarded under this heading.

There are limits beyond which damages may not be awarded, because the claim is too remote from the incident which occasioned the loss. For example, if you break your

leg in a motor accident due to the negligence of the driver of the car, you may recover the expense and loss which you incur as a result of the injury, as well as compensation for your pain and suffering. If, however, you do not fracture a bone, but suffer from shock, and your doctor orders you to spend a week in bed in order to recover from the shock, you are expected to obey the doctor's order. You cannot claim extra compensation if you suffer a relapse because you keep an important business appointment when you ought to be in bed. If the result of your disobedience to the doctor's order is a six months' illness, the damage you suffer is too remote from the original accident. It is the result of your disobedience to the doctor. This is not the responsibility of the driver of the car.

When damages are awarded, they are of two kinds, 'special damages' and 'general damages'. The former consist of the loss which is, in fact, caused by the wrongful act, *e.g.*, loss of salary or wages, doctors' fees and other proper out of pocket expenses. General damage is that which in cases of tort is recognised by the law as the natural consequence of a wrongful act, and it will be assessed by the Court in addition to the special damage. The principles to which we have referred usually limit the amount of damage which may be recovered for a breach of contract to 'special damage'—*i.e.*, the actual loss which the aggrieved party has suffered. A man is not entitled in such a case to recover general damages. For example, a man who was dismissed from his employment and claimed general damages, because the circumstances in which he had been dismissed were of an ignominious character, failed in the House of Lords to recover compensation on this footing. His damages were limited to the actual loss of salary which he suffered by reason of his dismissal. A Court which allowed an actress damages for breach of contract when she was dismissed from the principal part for which she had been engaged, and took the question of her reputation into consideration when the compensation was assessed, did not depart from this principle. It allowed such compensation on the footing that it was an implied term of the contract

that she should be permitted to appear in the principal part for which she had been engaged, and it considered the refusal of the management to allow her to play the part was a breach which was bound to damage her prospects of increasing her reputation.

Sometimes the contract itself will prescribe the amount of the damage which is to be paid in the event of a breach. For example, a contract for the sale of a business may contain a condition which restricts the vendor from carrying on a competing business within a specified radius. The contract may also include a clause binding the vendor to pay a sum of £100, or some other specified amount, for any breach of this condition. The Courts will not, however, necessarily enforce such a clause. The obligation to pay a fixed sum of £100 may be regarded as a 'penalty', and not a fair measure of the damage suffered by the other party to the contract. Whether an agreed sum payable on the breach of a condition is a penalty, or a fair measure of assessed damage, is a question of fact in each case. If, in the judgment of the Court, it is regarded as a penalty, it will not be enforced, as it is against the policy of the law to impose payment, on a breach of contract, of a sum which is palpably in excess of any damage which may have been suffered by the aggrieved party.

You will find some further observations on the subject of damages in several other chapters. The subject is a fascinating one for an intending recipient. He should, however, approach the subject intelligently. If you are a claimant, and a reasonable compromise is proposed to settle your claim, you may be foolish if you are over-confident and reject the offer without serious consideration, merely because it does not come up to your expectations. There are many instances when an apparently unanswerable claim has failed, owing to some unforeseen difficulty, and when this occurs, the plaintiff not only loses all, but may also be heavily out of pocket. To reject the substance for the shadow was the folly of the dog with the bone in its mouth, which saw its own reflection in the water. Be careful, if occasion arises, that it does not also become your fate.

CONTRACTS

'How agrees the Devil and thee about thy soul,
that thou soldest him on Good Friday last for a cup
of Madeira and a cold capon's leg?'

King Henry IV, Part 1

THE essential features of every contract were outlined in the preceding chapter. There is no reason why a cup of madeira and a cold capon's leg should not be good consideration to support a contract, but whether or not the Court would consider a contract by the Devil to acquire a man's soul to be against public policy is another matter. It might, of course, depend on the man.

When you enter the realm of contract, it is in some respects like entering a large West-End store. Which of the many departments do you want? One branch of the law of contract deals with the relations between employer and employee, a second with principal and agent, a third with vendor and purchaser, and there are a number of others. Each department has its own special regulations, most of them based on the Common Law, but some on Statute Law, whilst there are some features which are common to all. These common features are dealt with in this chapter. When you have read it, it will be easier for you to find your way about each of the departments in turn, and when you leave the store you will understand some of the basic principles which guide the Common Law of England. You will have a better idea of the function of the law and the extent of its development. Ignorance of the law is never an excuse for infringement, as everyone is supposed to know the law, although, in fact, no one knows the law, nor is it possible for anyone to do so. It is an 'unfinished symphony' which must always develop to meet the changing social character of the community. The function of a Judge when a question of law arises is either to construe any relevant Act of Parliament or to construe and apply any existing precedent of the Common Law which

will help him to elucidate the problem. A Judge does not make new law—he applies the existing law according to the construction which he places on the meaning of words and phrases.

It has been stated that most contracts may be verbal—that is, by word of mouth—but there are some which cannot be legally enforced, unless their essential terms and conditions are reduced into writing. In either event the terms of the contract must be clear and specific, or capable of exact construction. They must not be vague or indefinite. The three ingredients mentioned in the previous chapter—viz., offer, acceptance, and consideration—are essential to every contract except one which is under seal. To speak of an ‘understanding’ as an agreement is misleading. It rarely has any legal significance when you say of your dealings with another that it was ‘understood’ that he should do a certain act. Either it was, in fact, agreed between you or it was not agreed. In the former case it is not an understanding, but an agreement, and in the latter case it is without legal effect. When you speak of an ‘understanding’, you refer, as a rule, to something which you yourself understood. It does not follow that the other party to the negotiations had a similar understanding. You should therefore always be careful to avoid anything which may be referred to simply as an ‘understanding’.

A ‘promise’ is another feature of daily life which has ordinarily no legal significance. It cannot be enforced in law, because there is no consideration involved in a promise. If consideration is given for a promise, it ceases to be a promise and becomes a bargain, and enforceable as such.

A ‘gentleman’s agreement’ is equally without legal significance, since it only binds the parties morally. The term is frequently applied to an ‘agreement’ which relates to betting or gambling. Such agreements, discussed in Chapter II, are not enforceable in law, but in the eighteenth and nineteenth centuries ‘debts of honour’ frequently ranked higher than legal obligations, and even to-day some people consider it more meritorious to pay a gaming debt than to pay a tailor’s account.

The contracts, the terms of which must be reduced into writing, signed by the person to be charged (*i.e.*, sought to be held responsible) before they may be enforced in the event of subsequent default, were originally set out in a Statute called the Statute of Frauds passed in the year 1677. Contracts there referred to fall into four principal categories. They are :

(1) *Contracts Relating to Land.* These are of wide application, and any agreement which you may make relating to land must be reduced into writing, or it cannot, generally speaking, be enforced. This class of contract is dealt with in Chapters 16, 17 and 18.

(2) *Contracts which Cannot be Performed within a Year.* These refer to all long-term agreements—*e.g.*, if a company wishes to engage the services of a manager for a period of five years—the agreement must be confirmed in writing. Contracts of employment of this character are called service agreements, and are dealt with in Chapter 4.

(3) *Contracts for the Sale of Goods to a Value in Excess of £10.* This class of contract is now dealt with by the Sale of Goods Act 1893. If you verbally agree to purchase a piano from Richard Roe for £50, and you both agree to conclude the bargain on the following day, you may call with £50 in cash at the appointed time for the purpose of completing the deal. Richard Roe may, however, refuse to accept payment and refuse to deliver the piano. He may tell you that he has had a better offer since the previous day and has decided not to sell you the piano. In that event you have no legal remedy. On the other hand, if you had both signed a memorandum to record the sale, after the negotiations had been concluded, either party may sue the other if the agreement is broken. This class of contract will be considered in Chapter 6.

(4) *Contracts of Guarantee.* John Doe may wish for an overdraft from his bankers, but they may be unwilling to lend him the money unless someone of standing is prepared to guarantee repayment of the loan. If you are prepared to act as guarantor, and the Bank is willing to accept you as a citizen of integrity who honours his engagements, it will not

suffice for you to tell the bank manager that he may lend the money to John Doe and that you will accept responsibility for repayment. You will be asked to sign a document which will place your guarantee on record. The Bank is making a business deal, and however honest you may be, your promise to guarantee a debt is of no value in law unless it is in writing. The form which you will be asked by the Bank to sign will not only contain your undertaking to pay the debt on demand, if Mr. Doe defaults, but will contain provisions to enable the Bank to enforce its rights against you, which are as extensive as those which it has against Mr. Doe. You will, accordingly, be well advised, if a friend asks you to guarantee payment of a debt, to refuse to do so unless you are ready and willing to pay in cash on demand the maximum sum due under the guarantee.

When we say it is necessary for any contract to be in writing, it is really loose speaking. It is not essential for the actual bargain which has been struck to be in writing at the time it is made. For example, on 1st January, 1947, John Doe may verbally agree to buy a house from Richard Roe for £1250. Although this verbal agreement cannot be legally enforced, the written memorandum, required to record the agreement, in order to make it an enforceable bargain, may be made at any subsequent date.

In some instances there are exceptions to the rule which requires these specified contracts to be recorded in writing. One of these exceptions arises when there has been what is called in law 'part performance' of a contract relating to land, or an act equivalent to part performance. Part performance is some step taken by the party against whom enforcement is sought, which affords evidence of his intention to take the benefit of the contract. In such a case it would be inequitable to permit repudiation of the bargain. For instance, if you have verbally agreed to take a lease of premises on certain agreed terms, and the landlord lets you into possession before any contract is signed, and accepts the first payment of rent, there may be sufficient part performance of the contract to prevent either you or the landlord from avoiding the agreement.

A rule analogous to that of part performance arises when goods are sold under a verbal agreement. The Sale of Goods Act 1893 contains a provision that if a deposit has been paid, or part of the goods sold have been accepted and received, or a token exchanged, which will be evidence of the existence of the contract, the absence of a written memorandum will not bar a claim to enforce the contract.

Written contracts fall into two classes. They may be either ordinary signed agreements, which are described as agreements 'under hand', or they may be agreements 'under seal', which are contained in a 'deed', a formal document bearing a seal and 'signed, sealed and delivered' by repetition of the words 'I deliver this as my Act and Deed' with a finger placed on the seal at the time of signing. The law has a 'superstitious reverence' for a seal, and the formalities which attend the 'execution' of the deed, as the signing is called, involve important legal consequences, for the doctrine of 'estoppel', referred to in the previous chapter, may come into operation. 'Estoppel by deed' means that, in the absence of fraud or misrepresentation, a party to a deed is not entitled to repudiate its contents, for after he has signed it he must accept every statement which it contains as being accurate.

There is nothing illegal in making a verbal contract which falls within one of the categories which require a written contract. The disadvantage of the verbal agreement will become apparent only if it is repudiated or broken by one of the parties. In the absence of the written memorandum the injured party will then be unable to obtain any legal redress.

The class of contracts known as 'illegal contracts' are in quite a different category. Illegal contracts fall into two divisions. They may be illegal because they infringe an Act of Parliament, or they may be illegal because they are contrary to public policy. There is no precise definition of public policy, but when one approaches the subject one treads on 'unsafe and treacherous ground'. Generally speaking, an act against public policy is an act which is contrary to the

moral law and spirit in which the business of the country, as a well-ordered community, is from time to time conducted. Contracts made for an immoral purpose, or designed to cause legal injury to third parties, are examples of illegal contracts. If Doe and Roe enter into an agreement with each other deliberately and fraudulently to represent a picture as having been painted by Rubens, with a view to its sale, it is an illegal agreement. If Doe and Roe subsequently fall out and Doe refuses to pay Roe his share of the swindle, the law will refuse to enforce the contract between them. Indeed, they may also be prosecuted, for an agreement between two or more persons which is designed to cause legal injury to a third, may constitute the offence of conspiracy, a crime punishable by imprisonment as well as being a civil offence.

There is another class of contract which is not illegal but may nevertheless be unenforceable. It is called a 'voidable contract'. A voidable contract is a contract made with a person who is 'under a disability'. For example, a person of unsound mind is under a disability, and cannot be held to the terms of a contract which he has made. Persons of unsound mind receive very particular care and protection from the law. They should never be described as 'lunatics', for they are known to the Courts as 'patients'. If a person becomes unable to manage his affairs by reason of mental incapacity, the proper course for his relatives is to apply to the High Court for the appointment of a receiver, who will be authorised to manage the affairs of the 'patient' under strict control. A contract made with a person of unsound mind is known as voidable and not void, because the receiver, on behalf of the patient, may be authorised to accept the contract. If this is done, the contract is said to be 'ratified', and it then becomes enforceable. Unless, however, it is so approved it is of no legal effect, because the law will not bind a man to an agreement when he is not capable of understanding and appreciating the nature of his acts. Infants—*i.e.*, persons under twenty-one years of age—are in a similar category to persons of unsound mind in this respect. Consequently a contract with an infant is not generally binding on

the infant, and such contracts are considered in Chapter 23. Married women, previously under a disability and unable to enter into contracts, are now capable of contracting without legal restraint.

The remedy for the breach of a contract may be either by way of damages or by specific performance—*i.e.*, an order from the Court directing the defaulting party to fulfil his obligations. The Court will, generally speaking, only order specific performance of a contract in a case in which damages would prove an inadequate remedy. If you agree to purchase a house, it is sometimes difficult to assess the compensation which it would be fair to award, if the agreement is broken by the vendor. No two houses are exactly alike, and you may accordingly ask the Court to order the vendor to complete the sale. If, on the other hand, you enter into an agreement with a decorator to repaint your house, and you stop him working when the house is half painted, the law will not compel you to allow him to finish the work. The amount of damage which he has suffered can be exactly measured. It will be equivalent to any expense which he has incurred, together with the profit which he would have made if the contract had been completed. The Court may order you to pay that amount by way of damages.

A breach of contract may sometimes be restrained by the Court by granting an 'injunction'. An injunction is a peremptory order which restrains a person from committing an act which is a breach of his legal duty, or orders him to carry out a specific obligation. We shall meet the term again when we come to Chapter 13. The person against whom the injunction is granted will be guilty of contempt of Court if he disregards its terms, and he may then be committed to prison until such time as he is deemed to have purged his contempt.

A contract is said to be 'performed' or 'discharged' when all the obligations have been fulfilled on both sides. Sometimes it is not possible to complete a contract. If a fruit merchant agreed in 1938 to import 1,000 tons of bananas a year from Jamaica for each of the five following years, it

would have been impossible to complete the contract because it became illegal to import bananas shortly after the outbreak of the war. In such circumstances the contract is said to be 'frustrated', and, generally speaking, neither party is under any obligation to the other after the date of frustration, although, in certain cases, payments which have already been made under the contract may be recovered. Again, the subject-matter of the contract may cease to exist. If your house had been destroyed by fire before the decorator had commenced to paint it, in accordance with the terms of his contract, there would be nothing left to paint. The contract has been frustrated, and if the fire was not due to any fault on your part, it will be discharged without further liability on either side.

A contract may also be brought to an end by repudiation. Repudiation is a refusal to be bound by the terms of the contract, or conduct which makes it clear that the defaulting party does not intend to fulfil his part of the contract, even before the date for performance has arrived. Some examples have already been given. Not every breach of a contract is an act of repudiation. When an employee is guilty of absenteeism, he is breaking his contract of employment, which requires him to attend his work daily. He is not, however, as a rule, intending to repudiate the contract. He is absent one day, but comes to work on the following day, and he is not acting in a way which justifies a contention that he does not intend to fulfil the contract. If a condition of a contract is broken, it is a question of fact, in each case, as to whether the breach is of such a character as to justify a claim that the person in breach had no longer any intention of being bound by the terms of the contract. When a contract is repudiated, the other party may accept the repudiation, or may refuse to do so, and insist upon holding the defaulting party to the bargain. In either event he may claim damages for breach of contract.

The death of one of the parties to a contract will not normally affect its validity, except in the case of a contract for personal services, when the contract will be discharged

or terminated. In other cases, the personal representatives of the estate of the deceased person will stand in his place, and the provisions of the contract may normally be enforced by either party.

It has been observed that contracts are a feature of daily life. It is doubtful, however, if the average man appreciates the extent to which they enter into his affairs.

He gets up in the morning, and after breakfast he leaves for his work by train, tram or bus. Whichever method of travel he adopts, it involves a contract—an agreement by the transport company to carry him to his destination in consideration of the payment of the fare. He arrives at his work, and his employment is regulated by contract. At mid-day he visits a restaurant or café for dinner—another act which involves a contractual relationship between the proprietor of the restaurant and himself. After his meal, he returns to his work, and perhaps he may make a telephone call, or write a letter to his Insurance Company enclosing a cheque for a renewal premium, which he later drops in the pillar-box. The cheque is drawn as a result of a contract between himself and his bankers, the payment of the renewal premium results from a contract between himself and the Insurance Company, whilst both the telephone connection and the delivery of the letter are effected as a result of a contract with the Post Office. When our friend returns home in the evening he may do so by the same form of transport as he set out, and finally, if he is a married man, he will find, when he arrives home, that during his absence his wife has been to the butcher, the baker, the grocer and the green-grocer—and every purchase she has made has involved business of a contractual character.

Every one of these contracts is regulated by conditions which are accepted by the parties. They are always at liberty to include any terms in a contract so long as such terms are not illegal or contrary to public policy. Every such contract involves legal rights and obligations which will be enforced by the Courts, and when you seek advice and enquire as to your contractual rights against another member of the com-

munity, the answer must always be 'What did you agree? What were the terms of your contract?' If the terms of a contract are clear and specific, it will be easier to define the legal rights of the parties, if there is any subsequent disagreement between them. If, however, the parties fail to define the conditions of their contracts in precise terms, it is not reasonable to blame the law for being unwilling and unable to do so.

EMPLOYER AND EMPLOYEE

'The wages of sin is death, but the wages of engineers are worse.'—Banner at Engineering Union Meeting reported by B.B.C. in 9 p.m. news on March 23, 1946.

THE law which governs the relationship between employer and employee is known as the law of Master and Servant—not, perhaps, a very happy expression to describe relations which should exist between the owner of a business or industry and those who work in it and are expected to help to establish its prosperity.

In most cases a man's employment is not governed by any written document. Nevertheless, every such employment necessarily implies a contract or agreement. Unless, however, the employment is for a fixed term exceeding a year, a written agreement is not legally necessary.

When you apply for a job, you will, of course, be vitally interested in the hours of work and the amount of the wages or salary which you are to receive. As is generally known, the law requires income tax to be deducted from all salaries or wages before payment—a matter which is dealt with in Chapter 28. It is not so generally known that wages and salaries must always be paid in cash, and never in kind. In the absence of any agreement to the contrary, you are entitled, unless you are engaged on piece-work, to receive the agreed wage or salary during the entire term of your employment. Your right to recover payment during periods when you are absent through illness or other unavoidable cause is a question of fact which depends in each case on the terms of employment. If nothing has been said on the subject, the Court must draw an inference, from the evidence, as to the intention of the parties. The obligations of the employee include an obligation to attend to his work during the prescribed hours, and if he deliberately stays away—*i.e.*, voluntary absenteeism—his employer is entitled to make a

claim for damages against him for breach of agreement. The amount of the damages, if such a claim is made, will normally be the loss which the employer has suffered as a result of the worker's absence, and may include the additional cost of any substitute employed to replace him. If you are a worker who is being paid by piece-work, you will not be entitled, in the absence of agreement, to receive payment during periods when you are away either through illness or other cause.

If you are injured when you are working, you will be entitled at an early date to receive compensation under the National Insurance (Industrial Injuries) Act 1946, which received the Royal Assent on July 26, 1946. This Act will replace the Workman's Compensation Acts and will apply to accidents occurring "after the appointed day," the "appointed day" being such day as the Minister of Health may appoint. Under this Act the State accepts responsibility for compensation for industrial injuries, and makes it part of the country's social services. All persons employed in Great Britain under any contract of service or apprenticeship are insurable without income limit. In addition, compensation may be paid to other industrial workers, such as lifeboat crews, taxi-drivers, seamen carried in British-owned ships, and certain airmen employed in British aircraft, but most casual workers are not included. Both employer and employee are required to pay weekly premiums to provide for the fund out of which the compensation will be paid, the rates being 4*d.* a week for the employer, 4*d.* a week for a male employee over eighteen and 3*d.* a week in each case for a female employee over eighteen. Boys under eighteen pay 2½*d.* a week, and girls under eighteen pay 2*d.* a week, the employer paying a similar amount in each case.

Compensation under the Act falls into three classes: (1) injury benefit; (2) disablement benefit, which is subdivided into two sections: (a) a disablement gratuity and (b) a disablement pension, and (3) death benefit.

'Injury Benefit' is payable to an insured person for every day of incapacity within 156 days from the date of the

accident, but unless the disability lasts for 12 days, no benefit is payable for the first 3 days. The benefit for an adult under this heading is 45s. a week.

'Disablement benefit' is payable to an insured person who has not recovered within 156 days, but is suffering from physical or mental disability, either of a permanent nature, or not less than 20% in extent. It is also payable in cases in which the disablement arises at a later date, as a result of the accident. If the disability is permanent, but not less than 20% in extent, the insured is entitled to a 'disablement gratuity' not exceeding £150. If the disablement amounts to 20% or more a 'disablement pension' may be paid, not exceeding 45s. per week, in the case of total disablement. This pension may, however, be increased in certain circumstances. To speak of a 20% disability may sound vague and not very intelligible. Assume, however, that a workman earning £5 a week is injured by accident, and loses the tip of one finger. This will be a permanent disablement, but, unless the employment was of a special type which required the particular use of the lost finger, it is unlikely that the earning capacity of the workman will be reduced by as much as 20%, which would mean that he was only able to earn £4 a week. In most cases a lost finger-tip would not be expected to result in such a drastic loss of earning capacity. Assuming, therefore, that the worker was able to earn £4 10s. a week after the accident, instead of £5 per week, he would qualify for the disablement gratuity not exceeding £150.

'Death Benefit' is payable to certain relatives of dependants, when death results from the accident. A widow who was residing with the deceased or being maintained by him is entitled to a pension for life, or until remarriage, of a sum between 20s. and 30s. a week, and a gratuity on re-marriage equivalent to a year's pension. A widower, if he was wholly or mainly supported by the deceased, and permanently incapable of self-support, receives a life pension of 30s. a week. A weekly allowance of 7s. 6d. is payable for a child of the deceased, and parents and dependent relatives, including an

'unmarried wife', are entitled to a pension under prescribed conditions.

All these provisions relate to accidents. The Act also gives power to the Minister of Labour to make regulations for compensation when the nature of the insured's employment leads to disease, or personal injury not caused by accident.

To qualify for compensation in one of the three prescribed classes the personal injury which the insured has received must have been caused by an accident 'arising out of and in the course of his employment'. This phrase, reproduced from the earlier Workman's Compensation Acts, sounds easy and simple to construe. It has, however, been the subject of a great deal of litigation, and illustrates how apparently elementary language may present difficult problems of interpretation.

It is probable, however, that many of these difficulties will no longer exist under the provisions of the new Act, since clauses have been included which extend substantially the rights of the worker to compensation. For example, an accident is now to be deemed to arise 'out of and in the course of the employment', although at the time of the accident the worker may have been acting, in certain circumstances, without instructions, or even in defiance of regulations or orders actually given to him, provided that the accident would otherwise have been covered by the Act, and further provided that it was done for the purpose of and in connection with the employer's trade or business. Moreover, for the purposes of the Act, an accident arising 'in the course of' employment is now to be deemed also to have arisen 'out of' that employment, in the absence of evidence to the contrary. The Act has been also extended to include accidents happening in certain circumstances whilst the insured person is travelling as a passenger to or from his place of work with express or implied permission of the employer, but this does not apply if the accident occurs in a vehicle which is being operated in the ordinary course of a public transport service.

Compensation is for loss of wages only. It is based upon the actual earnings at the time of the accident. There may be

either total or partial incapacity, and, as indicated, the compensation is assessed according to the extent of the incapacity. The rate of compensation may also be varied from time to time, in the event either of improvement in health or a relapse.

If the question of compensation is not settled by agreement, recourse may ultimately be had to special tribunals which are set up under the Act, but in the majority of cases questions are, in the first place, to be determined by one of the Insurance Officers to be appointed by the Minister. There is also power in the Act to give a workman training for a new job if his disability prevents his return to his old job.

The claim to compensation under the Act is not necessarily the only remedy open to a man injured at his work, although he may be barred from other remedies if he accepts compensation under the Act.

Quite irrespective, however, of the right of an employee to recover compensation under the Act, an employer owes a duty to his employee at Common Law, and also under the provisions of the Employers Liability Act 1880, not to do any act calculated to cause him injury, and if he neglects this duty, and injury results, damages may be assessed on the same basis as they are assessed in any other case of negligence, and in accordance with the principles considered in Chapter 2. The negligent act may be a failure to exercise proper precautions, or it may be a breach of a statutory duty—*i.e.*, a duty expressly prescribed by law. For example, the Factory Acts, generally speaking, require machinery to be fenced, in order to minimise danger to employees, and if, as a result of the employer neglecting this duty, injury results to one of his employees, the employer may be sued. Although a man is working at an unfenced machine, however, he must be careful not to do any foolhardy act. Otherwise, in the event of an accident, his employer may plead that the foolhardy act was the immediate or proximate cause of the accident, and if he is able to prove this, he may escape from liability.

If the result of an employee's negligence is to injure one of his fellow-workers, the employer will not necessarily be

liable, for there is an exception to the general rule which makes an employer liable for the negligent acts of his employee, and it is founded upon the doctrine known as 'common employment'. This doctrine relieves an employer from Common Law liability when one of his employees injures another worker in his employ as a result of negligence. For example, if a bus conductor is injured in an accident, which is due to the negligence of the driver of his bus, the former will have no claim against the Company for damages in respect of such negligence.

'Common Employment' proved a blessing to employers prior to the passing of the Employers' Liability Act 1880, which made the defence ineffective, subject to prescribed conditions, with regard to certain classes of employees, and, in particular, manual labourers. Those untouched by the Act are still, however, subject to the vicious operation of the doctrine, but it has never been a popular one with the Courts. In these days, big combines number their employees by the thousand, and few of them are manual labourers. The Courts, however, endeavour to limit the scope of operation of the doctrine, and they have refused to apply it in a case in which the driver of a motor vehicle, owned by a Corporation, was injured as a result of a street accident due to the negligence of the driver of another vehicle owned by the same Corporation. The Courts rejected the Corporation's plea of 'Common Employment', and decided the doctrine was only to be applied in cases in which the work 'necessarily and naturally and in the normal course involved juxtaposition, local or casual, of the fellow employee, and exposure to the risk of the negligence of one affecting the other'. The lack of skill of the driver of one vehicle owned by a Corporation would not be expected to expose the driver of another vehicle, in the employ of the same Corporation, to injury. The Corporation were not therefore relieved of their Common Law liability because both drivers happened fortuitously to be in their employ. It was a case in which the doctrine of 'common sense' took precedence over the doctrine of 'Common Employment'.

If an employee is engaged upon employment of a particularly hazardous character, and he meets with an accident due to the dangerous nature of the work, he may not be able to claim compensation, other than under the National Insurance Act. The employer is entitled to contend that as the worker has voluntarily undertaken the risk, he cannot recover compensation for an accident which work of that character may have been expected to entail.

This doctrine is also out of favour with the Courts. The ordinary man must earn his living, and if the only work open to him is of a hazardous character, his acceptance or refusal of it may involve little freewill. The doctrine will therefore only be applied when the acceptance of the risk is voluntary in the true sense of the word. For example, it would apply in the case of a cinema actor injured by jumping out of a burning building as part of a film. It did not, however, apply during the war in the case of an engine-driver who drove his engine into a bomb crater. He was instructed to drive his engine cautiously after an air raid, and he did so. Nevertheless it fell in the crater, and the driver was injured. The Court decided that the Company had no right to order the driver to proceed in the circumstances, until proper steps had been taken by the Railway officials to satisfy themselves that the line was clear. It was not a case in which the driver had voluntarily undertaken a hazardous risk, for an engine-driver does not expect to expose himself to such a risk when he undertakes to drive an engine.

When a man is dismissed from his employment, a question frequently arises as to whether or not he has received proper notice to terminate his employment. If there is a contract in writing, provision should be made as to the length of notice which is to be given on either side. If, however, the employment is verbal, and nothing is said at the time of employment as to the length of notice required, a man is entitled to receive and is required to give 'reasonable' notice. 'Reasonable' notice is a question of fact. In a few instances the length of notice deemed to be reasonable is established by custom. For example, a domestic servant, who is paid monthly, has estab-

lished, by custom, the right to receive one calendar month's notice. At the other end of the scale there are cases in which an hour's notice only is customary. For the sake of good relations between employer and employee, and to reduce fear of unemployment, it is to be hoped that on some occasion the Government will have time to turn its attention to this problem, and will be able to introduce legislation which will make it illegal to terminate an employee's services at an hour's notice. When there is no contract or custom, the question as to what is reasonable notice is one of fact. Each case must be treated on its merits. Generally speaking, if you receive your wages weekly, you are entitled to receive a week's notice, as this is a reasonable notice. If you are paid by the month, you are entitled to a month's notice. The principal factors which have to be taken into consideration when determining the question of reasonable notice are the importance of the work and the ease or difficulty with which the employee will be able to obtain other employment of a similar character, and the employer is able to replace the employee.

If a man is guilty of wilful disobedience to a proper order given to him in the course of his employment, or if he is guilty of gross misconduct, his employer is entitled to dismiss him summarily—*i.e.*, without any notice. If he is paid a fixed weekly wage, he is not, in that event, entitled to a proportion of his week's money. Each week is treated as a separate period of employment, and a man is not entitled to half a week's pay for half a week's work, if he is summarily dismissed for wilful misconduct in the middle of the week. An employer must, however, exercise his right of dismissal in such a case without delay. He cannot use the pretext of 'wilful misconduct' to dismiss a man summarily a fortnight after the alleged misconduct has come to his notice. Unless he acts promptly, and as soon as the misconduct is known to him, he loses his right of summary dismissal.

If a man is dismissed without proper notice, he is entitled to claim damages for wrongful dismissal. In that event it is his duty to try to find other employment, so as to mitigate the damage which follows from the breach of contract. Wrongful

dismissal of an employee, without notice, is on the same footing as any other breach of contract. If you are being paid £6 a week, and you are dismissed without notice, but can satisfy the Court that three months' notice would have been a reasonable notice, you will be entitled to claim £78 damages. If, however, you have obtained other employment during the three months in question, or if you could have done so if you had been diligent, you must give credit against the £78 for the amount which you have earned or might have earned during that period.

Other usual terms of a contract of employment include (1) a term implied in every verbal contract of employment which requires the employee to serve the employer faithfully. The acceptance of a secret commission, or bribe, is a breach of that duty, and may also be a criminal offence, which is more specifically dealt with in Chapter 5. (2) An obligation on the employee to obey all lawful instructions given to him by his employer which fall within the scope of his employment, and never to disclose his employer's business secrets. (3) The question of holidays. This is a matter for express agreement between the parties. In the absence of agreement, and subject to the rights established in certain trades, an employee's legal right to insist upon a holiday may be difficult to establish.

After the termination of his employment, a man is entitled to use, for his own benefit, any information which he has received which has improved his skill or knowledge of his trade. He must not, however, make use of any secret process or invention which it was part of his duty to discover in the course of his employment. These belong to his former employer. He is also not entitled to remove any papers or documents which belong to his employer. There is, however, nothing to prevent him from approaching customers of his former employer and soliciting their custom, provided he has only approached customers whose names he retains in his memory. He is not entitled to take their names from any list of customers which he has appropriated or copied.

An employee is not entitled to require a reference from his former employer, but if the employer gives him a reference it must be fairly and honestly given, or the employee may have a right of action for defamation, a subject dealt with in Chapter 15.

Good relations between employer and employee are essential to the welfare of the community. Both parties may be to blame when they are lacking, for there are both bad employers and bad employees. Bad employers were responsible for the birth of the Trade Union movement, but we have made progress since the days when a Trade Union was regarded in law as being an illegal combination. Any worker in these days who does not join a Union which is applicable to his trade is weakening a system which has proved of inestimable value to the community as a whole, for the work performed by the Unions during the last fifty years in bettering the conditions of employment is beyond calculation. Before a man exercises his right to strike against the advice of his Union, he should think over the meaning of the phrase 'stab in the back'. No worker ought to criticise his Union because it requires its members to fulfil their legal obligations, and to give a proper notice before withholding their labour. The repeal of the Trades Dispute and Trade Union Act 1927 has placed the Trade Unions in the same powerful position as they were before the General Strike of 1926, but their legal rights and obligations are still governed in many respects by Acts of Parliament which are outside the scope of this book. We need, however, never forget that the principal sufferers from all strikes must inevitably be members of the public, and although John Citizen may be sympathetic towards an authorised strike, he is not to be blamed if he feels that unauthorised strikes suggest that the striker, unwilling to trust his Union, has more concern for his rights than for his obligations. An unauthorised strike may also give the employer a halo of sanctity which he has by no means earned.

PRINCIPAL AND AGENT

'Our friend has exceeded his instructions again.
So much the worse for him.'

The Man of Property

AN agent is a person who is authorised to carry out an act for and on behalf of another man, who is called the principal. The primary duty of the agent is to act in good faith towards his principal, and to devote to the interests of his principal such care and attention as a man of ordinary prudence bestows on his own affairs. Sometimes, the agency business may be carried out in the name of the agent, but usually it is carried out in the name of the principal. In most cases, the agent must himself carry out the duties for which he is appointed. He is not allowed to delegate them to other parties, unless he is specially authorised to do so.

You may have dealings with agents several times in the course of a day. In many cases the contracts referred to in Chapter 3 are made with agents. When you travel by bus, the conductor to whom you pay your fare is an agent, as well as an employee, of the transport company. He is authorised, as an agent, to accept your fare and to issue you with a ticket. When you telephone, the telephone operator is the agent of the Postmaster-General. If you instruct a solicitor on a business matter, which involves negotiations or dealings with a third party on your behalf, he carries out those negotiations or dealings as your agent.

If Richard Roe, as an agent for John Doe, enters into a written agreement with you, he will usually do so in the name of John Doe. He will sign the agreement 'For and on behalf of John Doe, Richard Roe'. Alternatively he may sign 'John Doe, p.p. Richard Roe'; 'p.p.' means per procuration, or by the agency of Richard Roe. If Richard Roe signs in a way which makes it clear that he is signing as an agent, and not on his own account, he cannot, generally speaking, be held personally liable on the contract. So

long as he has acted within the scope of his authority, John Doe will be the only person bound by the contract. If there is a subsequent breach of the contract, you may only make a claim against John Doe. On the other hand, the agent may be made personally responsible, if he has exceeded his instructions.

If you are going abroad, you may wish to appoint an agent to manage your business affairs for you during your absence. In that event, you may give him a document under seal called a 'power of attorney', in which you appoint him to be your attorney or agent, and authorise him to carry out specified acts on your behalf and in your name for a specified minimum period. There will be a clause in the document by which you agree to ratify and confirm everything your attorney does on your behalf within the scope of his defined powers. It is necessary to make the power irrevocable for a minimum specified period, as otherwise any person proposing to deal with your attorney would have no assurance that the power was still operative. During the currency of the power of attorney you are bound by every act done by your attorney within the scope of his authority. Even if you die before the specified period has elapsed, the power is not revoked unless notice of your death has come to the knowledge of your attorney and to any person who is dealing with your attorney. If your attorney conceals your death and continues to act on the power, strangers, acting in good faith, are entitled to rely upon it and to make a claim against the personal representatives who are dealing with your estate after your death.

After the expiration of the specified period, the power of attorney may still be effective. After that time, however, any one dealing with your attorney should ask for evidence that the power has not in fact been revoked. He should satisfy himself that you are still living and that it is still in force. If he does not do so, you or your estate may not be bound, if in fact you have revoked the power, or have died.

Usually, an agent acts under less extensive powers than those conferred on him by a power of attorney. If, for example,

you wish to sell or let a house, you will probably instruct an estate agent. He is an agent of a particular class who deals with the buying and selling of properties. You give him a limited authority to negotiate the sale or letting of your house for a specified purchase price or a particular rent. It is his duty to endeavour to obtain a purchaser or tenant in accordance with your instructions, and he must not do any act which is in conflict with this duty. He must not try to persuade you to accept a lower price for the house, because it will be more advantageous to him to sell it quickly, before it is sold through another agent. As a general rule, estate agents do not receive remuneration except when their efforts have led to success, and they are then paid on a commission basis. If you have notified the agent that you have appointed other agents to find a purchaser, and that you will only pay a commission to the agent who introduces the purchaser, he will naturally be anxious to strike a bargain as quickly as possible. He must not, however, allow this to influence his duty to you, even although he will receive no remuneration or commission for the trouble he has taken, if the purchaser is introduced by another agent.

If an agent negotiates the sale of your house for less than the figure you have authorised him to obtain, you are not bound by the transaction. He will not only have been guilty of a breach of his duty to you, but will also have laid himself open to an action for damages by the prospective purchaser of the house.

If you appoint more than one agent to find a purchaser for your house, you may become liable to pay commission to any agent who has given an order to view to the purchaser. To avoid this risk, you should notify each of the agents at the time when you give them your instructions that you will pay only one commission, if the house is sold, and that any dispute as to which agent has introduced the purchaser must be adjusted between the agents themselves.

If you appoint an agent as a sole agent for a limited period, it will give him greater incentive to find a purchaser for your house, as it gives him a better chance of earning his com-

mission. At the same time, you will be irrevocably committing yourself to the payment of a commission to that agent if the property is sold by him or any other agent during the period of his sole agency, as sole agency means an unqualified right to act on your behalf during the period of the agency. Accordingly, if you sell the house through another agent, it will be a breach of your obligation to the sole agent. He will be entitled to claim the commission which he would have earned if it had not been for the breach of your agreement appointing him as sole agent.

The commission charged by an estate agent varies according to the price of the property sold, or the rent of the property let. Particulars of the recognised scales laid down by the Institute of Auctioneers and Estate Agents are appended at the end of this chapter. Additional charges may be made when the property is offered for sale by auction.

If an agent asks you to sign a written authority for him to act, you should read the authority carefully before you sign it, and satisfy yourself that it does not provide for commission in excess of the recognised scale of the Institute. An estate agent is not bound to work on the Institute scale if he can find members of the public who are willing to pay him excessive fees.

An estate agent is not usually entitled to his commission unless he has introduced a purchaser who in fact completes the purchase of the property. The question as to whether the agent has earned his remuneration is in every instance a question of fact, which depends on the terms of the contract between the agent and his client. If an estate agent wants to be assured of his commission, when he introduces a purchaser, who is ready and willing to buy his client's house for the price he has been authorised to accept, he must insert an express condition to this effect in the agreement between his client and himself. Otherwise, if his client withdraws the property from the market after he has found a purchaser, but before the legal contract is signed, he may be deprived of his commission, and may have no claim for remuneration.

If you are a prospective purchaser, and obtain particulars

of a house from an estate agent, you must remember he is not your agent. He is the agent of the seller of the house. He does not ordinarily owe you, as the prospective purchaser, any duty. An estate agent will only owe a duty to a purchaser if he has received express instructions from the purchaser to find a house, and he is to receive remuneration for so doing. Otherwise, a purchaser must not rely upon the agent to volunteer any information about the house. He must make his own enquiries. This does not mean that the agent is entitled to furnish a purchaser with untrue or misleading particulars about the property. If the agent makes untrue representations, as a result of which the purchaser agrees to purchase the property, the latter may be able to repudiate the contract. If there was no deliberate intention to mislead, and the erroneous particulars were furnished innocently, the purchaser's rights are usually limited to rescission of the agreement. If, however, the false or misleading particulars were given recklessly or deliberately, the purchaser may also be able to claim damages for fraud.

When an agent is appointed for a specific purpose, he is usually entitled to carry out the work in his own time. He has no fixed hours, and subject to any express agreement to the contrary, he is entitled to use his own methods to carry out his duties. He is not at the beck and call of his principal, and he is not required to carry out any duty which is outside the scope of the purpose for which he has been appointed as agent.

This liberty of action does not, however, necessarily apply when an agent acts in a dual capacity, and his principal is also his employer. A London bus conductor who collects your fare does so as an agent of London Transport. He is also an employee of London Transport. He has to work fixed hours, and the terms of his employment are strictly regulated. His freedom of action as an agent is of very limited scope. He may collect your fare at any time whilst you are on the bus, but otherwise he has no real discretion as to the method of carrying out his duty as an agent. A railway booking clerk who issues tickets has even less scope. Nevertheless, he is

acting as an agent of the Company every time he issues a ticket. When you have dealings with Richard Roe as an employee of John Doe, you do not as a rule treat with him as an employee, but as an agent. The fact that he is an employee of John Doe as well as his agent is, generally speaking, irrelevant, so far as you are concerned.

When John Doe sends his servant, Richard Roe, to purchase groceries from the local Stores—and a bottle of whisky, if he can get it—the relation between John Doe and Richard Roe is that of master and servant, but Richard Roe is the agent of John Doe for the purpose of making the purchases. If John Doe has no account with the Stores, and the groceries are paid for in cash, neither the question of employment nor of agency is likely to arise. The manager of the Stores will not know, and will not be interested to know, whether Richard Roe is purchasing the groceries and whisky for his own account or for John Doe. If, however, the transaction is not a cash transaction, and John Doe has a credit account with the Stores, different considerations will arise. These considerations will usually be based on the laws which govern the relationship of principal and agent. The Stores will have no greater and no lesser right because Richard Roe happens to be also the employee of John Doe, and when Richard Roe orders the groceries on credit, he will do so as the authorised agent for John Doe. It follows that if the latter fails to pay the account, the Stores will not be able to make any claim against Richard Roe.

Transactions of this character seldom result in complications, but difficult legal problems arise when an agent does an act which is outside the scope of his authority, or if he acts fraudulently. If Richard Roe is dishonest, he may obtain whisky from the Stores for John Doe's account without any authority from John Doe. If he misappropriates the whisky, the question of John Doe's liability to the Stores for payment is likely to arise.

The general legal rule is that a principal is liable for the fraud of his agent if the fraud is committed within the scope of the agent's actual or implied authority, but he is not

liable if the fraudulent act was outside the scope of his actual or implied authority. It is therefore necessary in each instance to examine the relevant facts.

If John Doe has established a practice of sending his servant Richard Roe to purchase grocery and whisky from the Stores on credit, he will have held Richard Roe out to the Stores as his agent authorised to make the purchases for him. Ordering and fetching goods will accordingly be within the scope of his actual authority. If, therefore, Richard Roe, in fraud of his principal, keeps back a bottle of whisky which he has received, John Doe will usually be liable to the Stores for payment.

A similar result will follow if John Doe terminates Richard Roe's authority to purchase goods, but fails to notify the Stores that the authority has been revoked. In that case, when Richard Roe continues to order goods, he will be acting within the scope of his apparent or implied authority. The Stores will have no means of knowing that the actual authority has been terminated unless they are informed of this by John Doe.

On the other hand, if it has been the practice for Richard Roe to take a written order to the Stores each week, and if, contrary to this usual practice, the Stores foolishly deliver goods to Richard Roe without a written order, they cannot make John Doe pay the account in the event of Richard Roe misappropriating the goods. As it was outside the scope of his actual or implied authority to take delivery of goods on a verbal order, the Stores must bear the loss if they cannot recover payment from Richard Roe.

There is much common sense in these principles which are based on the general legal doctrine that when two innocent parties have been victimised by the fraud of a third party, the innocent party who by his conduct has enabled the fraud to be perpetrated must bear the loss. If your agent has defrauded the Stores through no fault of their own, it is, generally speaking, more reasonable that you should have to bear the loss than the Stores. You appoint your agent, you make enquiries as to his integrity, and you have an opportunity of judging his reliability. The Stores, who have been in the

habit of carrying out your instructions through his agency, have no means of investigating these matters, and it is not their business to enquire. If, on the other hand, the manager at the Stores is imprudent enough to give your agent goods on a verbal request, although he has always received your written orders, it would be unfair if the loss were to fall on your shoulders. The Stores suffer a loss, because their manager, as their agent, has failed to carry out your instructions to supply goods on a written order. Moreover, when two people transact business together over a prolonged period, each is entitled to assume that the normal course of dealing will be continued, unless and until any variation is notified to the other. If you lull a person into a certain state of belief by a particular course of conduct, it is proper you should notify him of any change in your arrangements. If you do not do so, it is logical for the law to say you are 'estopped' by your conduct from relying upon facts which have not been expressly brought to his notice, and to hold you responsible for any consequent loss or damage which he may have suffered. From a practical point of view, you should have the same consideration for the rights of others as you expect them to have for your rights. If, accordingly, you terminate your relations with an agent, you should notify every person who has had dealings with him, in order to make certain that you will be relieved of responsibility for his further actions.

It should be added that Richard Roe would himself be liable for payment of the goods, which he has fraudulently failed to deliver to his principal. In many cases he might not be in a position to meet the liability, and in some instances a criminal charge might be preferred against him for the fraud. If the acts done by Richard Roe, as an agent, fall short of fraud he may still be sued for damages in any case in which he has claimed to act as agent without authority. By his conduct he is said to have 'warranted' himself as having authority to act on behalf of John Doe—*i.e.*, he has held himself out as having such authority. A claim will then lie for damages for 'breach of warranty of authority'. The Stores would

be entitled to claim as damages the amount of the loss which they have suffered as a result of his breach of warranty.

There are many occasions when you may have to consider the relation of principal and agent. Chapter 2 included a brief survey of the legal liability of the employer for his employee's negligence in certain cases. The principles there referred to are, generally speaking, equally applicable in the case of principal and agent. In Chapter 24 reference is made to the right of a wife, in certain circumstances, to pledge her husband's credit for necessities as an 'agent of necessity'. In Chapter 7 the question of agency in connection with partnerships is considered, for every partner in a firm is an agent of the firm for certain purposes. Limited liability companies, explained in Chapters 19 and 20, also introduce many agency problems, for each of the directors of a limited liability company may be an agent of the Company, when he contracts with a third party on behalf of the Company.

Reference ought also to be made to the situation which arises when John Doe suffers a legal injury at the hands of a servant of the Crown. The servant may, of course, in many instances, be personally liable—*e.g.*, in the case of a road accident which arises from the negligent driving of a Post Office van, or an Army vehicle. The driver, however, will frequently be impecunious, and the ordinary law as to the liability of an employer or principal for the wrongful acts of his servants or agents does not apply, as it is superseded by the doctrine that the King can do no wrong. On the other hand, the 'Crown', as represented by his Majesty's Departmental Ministers, recognise the injustice which would follow from the inexorable application of this rule. It has therefore become a frequent practice, in a case of tort, for the relevant Government department to deal with the case on behalf of its employee, and either to settle, or to contest the claim on his behalf. If John Doe brings legal proceedings in such a case, it is the normal practice to bring the proceedings against the individual employee, and if John Doe wins the action, settlement of the claim will be effected out of public funds. It should be emphasised, however, that this is, at

present, an act of grace, and not a legal obligation of the Government, and the practice has recently been severely criticised by the House of Lords.

There are many classes of agents, other than those mentioned, but a brief word must suffice about one or two of them.

A 'del credere' agent is an agent who makes himself personally responsible to his principal for the due discharge by a third party of any monies due under a contract negotiated by the agent with the third party. He usually receives extra remuneration for accepting the liability.

A factor is a mercantile agent employed to buy or sell goods for a principal on a commission basis. A factor frequently acts for a principal resident abroad, and when an agent acts on behalf of anyone not resident in the English jurisdiction he may be personally liable for contracts entered into by him on behalf of his principal, whether he contracts in his own name or that of his principal, unless the terms of the contract exclude this personal liability.

A broker is an agent who carries out negotiations for the sale of various types of goods and chattels, and also stocks and shares. A broker may act in a dual capacity, for he is entitled to enter into a binding contract, on behalf of both the vendor and the purchaser, in respect of the subject-matter of the deal. This contract is frequently made in a recognised form, customary in that class of transaction. For example, a contract for the sale and purchase of shares will usually be effected by a stockbroker, who is a member of a Stock Exchange, and the contract, in a standard form, will be declared to be subject to the rules and regulations of the Stock Exchange.

Sometimes the agreement by which the principal appoints an agent is in writing, and sometimes it is verbal. In most cases, unless the agency is of simple character, it is preferable to have a written agreement. The contents of such an agreement must, of course, vary according to the nature of the agency, but here are some points to be observed in the case of an agency for the sale of goods—a very normal type of agency.

- (1) The exact scope of the agency should be described.
- (2) The duration of the agency should be specified. Normally, the death or bankruptcy of the principal or the agent will terminate the agency.
- (3) The remuneration to be paid to the agent for his services should be stated. If he is to be paid on a commission basis he will be known as a commission agent. He may also be entitled to receive, either a fixed allowance in respect of expenses, or reimbursement of expenses actually incurred by him. In cases in which an agent is employed for a special purpose, at a specified remuneration, he is, generally speaking, only entitled to his remuneration if the special purpose is fulfilled.
- (4) The basis upon which any commission is to be calculated should be defined with exactness, if disputes are to be avoided. If it is a percentage of the profits, the word 'profit' should be accurately defined, since there are various methods by which profits may be calculated. The agreement should also make it clear whether the commission is to be paid on orders obtained, orders accepted, or orders paid for—three very different things. It should also be made clear whether commission on repeat orders, or on orders received after the termination of the agency, is to be paid.
- (5) The principal may seek to include a clause in the agreement by which the agent agrees not to solicit the principal's customers after the termination of the agency. If a clause of this character is included, the agent should be careful to insist upon the right to continue to solicit any of his personal customers. Otherwise, the agent may find, after the agreement has been terminated, that he has parted with his entire connection without any compensation. He will then have to start his business life afresh. 'Restraint clauses', as they are called, are not popular with the law, but, if they are reasonable and do no more than give the principal fair protection, they will be upheld. If, however, they are unreasonable in any way, either in length of time or as regards territory, or the nature of the actual restraint itself, the whole restraint clause, unless it can be distinctly severed, may be held to be bad. If you are entering into a contract

containing a restraint clause, whether as a principal or an agent, you will be imprudent if you do not take legal advice as to its probable effect and validity.

(6) The agreement should provide for accounts to be rendered by the principal to the agent at periodic intervals, to show the commission he has earned. It should also set out the dates on which he is to receive payment of his commission, or other form of remuneration.

(7) The principal will usually reserve the right, by the terms of the agreement, to accept or reject orders. He will also take upon himself the responsibility for enquiry into the financial status of a new customer. The agent must not, however, recklessly accept an order from a man who he knows, or ought to know, is of bad financial standing, unless he discloses the fact to his principal. If he does accept such an order, it might be held that he had not acted in good faith, and he might make himself liable for any loss which ensues.

It will be unnecessary to include a clause in the agreement by which the agent agrees not to accept a secret commission. A person acting in the capacity of an agent must never accept a secret commission from a third party to whom he is selling or from whom he is buying. If he does so—*i.e.*, if he 'corruptly accepts or obtains for himself or for any other person any gift or consideration as an inducement or reward for doing or forbearing to do any act or business, or for showing or forbearing to show favour to any person in relation to his principal's affairs', he commits a criminal offence under the Prevention of Corruption Act 1906, and may be sentenced to a term of imprisonment. In such a case the principal is also entitled forthwith to terminate the agency, and to take proceedings for recovery of the bribe. The principal is further entitled to sue the third party for any loss which he has suffered. For example, if the principal has paid an inflated price for goods, because the seller has increased the price of the goods by the amount of the bribe paid to the agent, the principal may claim, as damages, the difference between the price which he has paid and the price which he would have paid, if corruption had not entered into the transaction.

The law attempts to keep the community straight, but it can be successful only when the community is ready and willing to co-operate. If large numbers of the community break the rules, it not only brings the law into disrepute, but also diminishes its efficiency. It is, however, unreasonable to blame the law when this occurs.

SCALE OF CHARGES APPROVED BY THE INSTITUTE OF
AUCTIONEERS, SURVEYORS AND ESTATE AGENTS.

SALE of PROPERTY.

5 % on first £300

2½ % on next £4,700

1½ % on excess of £5,000

with an addition of 5 % on £500 and 20 % on the excess of £500 in respect of sums paid by the purchaser for chattels, fixtures, fittings, trade-stocks and other movable effects, timber and tenant-rights.

LETTING of PROPERTY.

Unfurnished premises (excepting flats and offices with liability to repair, or farms and agricultural land) :

5 % of the rent if letting is for one year or less ;

7½ % of one year's rent if letting is for more than one and less than five years ;

10 % of one year's rent if letting is for five years or upwards.

Flats or offices or parts of a building when tenant is liable for repair or redecoration :

10 % on one year's rent irrespective of duration of letting.

Furnished Premises (including collection of rent) :

5 % on rent payable.

A commission on any premium, consideration, or goodwill is in every case payable in addition at the same rate as for the sale of property.

SALE OF GOODS

'A silk suit which cost me much money, and I
pray God make me able to pay for it.'

Samuel Pepys, 1st July, 1660

WHEN you purchase goods from a trader and you have received and paid for them, the liability of the trader in respect of the transaction is not necessarily at an end.

If, for example, you purchase a bicycle, and a month later, when you are cycling, it collapses and you fall and break your leg, you may under certain conditions have a legal remedy against the seller.

A number of factors must, however, be considered before it is possible to decide whether or not a man is entitled to make a legal complaint if an article which he has purchased proves at a later date to be defective. It is essential to ascertain, in particular, in every instance, the express and implied conditions of the sale.

When a dealer or a trader sells goods, he frequently makes representations as to the nature or quality of the goods he is selling. He may, for example, sell you a watch with a guarantee that, if kept under proper conditions, it will be an effective time-keeper for a specified period of years. A trader does not, however, necessarily describe the nature and quality of his goods. When you purchase a bicycle, nothing may be said on either side as to its condition. In such a case, however, and even although no word on the subject is exchanged between the buyer and the seller, the law will in certain cases deem or imply certain representations to have been made by the seller, unless such representations are expressly excluded by the terms of the bargain or contract.

Reference was made in Chapter 2 as to the general rule which makes a Court reluctant to imply a term in a contract which has not been expressly agreed between the parties. The Sale of Goods Act, 1893, has, however, provided a

number of exceptions to the rule in the case of a sale of goods to which the Act applies. The Act put a severe brake on the application of the maxim, 'Caveat emptor', or let the purchaser beware, the common maxim when goods are purchased. When the Act applies, certain representations are deemed to be included as a term of every contract of sale, unless they are expressly excluded by the terms of sale.

When I sell you a bicycle and tell you before you buy it that it has new tyres, I am said to make a representation as to the state of the tyres on the bicycle. Representations of this character fall into two classes: they may either be *conditions* or *warranties*, and there is an important distinction between the two, for the breach of a condition goes to the root of the contract, and may vitiate the whole transaction, whilst a breach of warranty does not affect the validity of the contract as a whole, but gives rise to a claim for damages only.

The distinction may best be explained by an example. If I sell you a cycle and tell you it has new tyres, this is, as we have said, a representation that the tyres are new. It will depend on the circumstances in which the representation was made as to whether it is a condition or a warranty of the sale. If you buy the cycle because I have made the representation as to the state of the tyres, and you had made it clear to me that you did not wish to purchase the cycle if its tyres were old, the state of the tyres becomes a condition of the contract, and as soon as you ascertain the tyres are old, you may claim to rescind the contract. If, on the other hand, your principal object in purchasing the cycle is to buy that cycle and no other, because it is the particular type for which you have been looking, then my representation that the cycle has new tyres may be only incidental to the purchase, and such a representation will amount to a warranty as distinct from a condition. In that case you will not be entitled to rescind the contract, but will have a claim for damages for breach of warranty and the amount of the damage you have suffered, and which you will be entitled to claim, will be the cost of obtaining new tyres, less any allowance you receive for the old ones.

The essential conditions and warranties implied in every contract of sale to which the Sale of Goods Act applies may, as stated, be expressly excluded. Most dealers in secondhand goods, in fact, expressly exclude all conditions and warranties from their terms of sale. If they did not do so, many of them would become bankrupt. Unless, however, they are so excluded, a purchaser of goods is entitled to rely upon them. They are four in number, and are as follows :—

(1) There is an implied representation by a man who sells goods that he has a legal right to sell the goods. They must be his absolute property or he must have been lawfully entrusted with their sale. If John Doe has sold you a stolen cycle you might be ordered by the Court to return the cycle to the owner, and you would then have a claim against John Doe for the return of your money. You would also be entitled to claim any expense which you had properly incurred in reasonably defending proceedings brought against you for the return of the cycle. It would not, however, be reasonable to defend an action for its return if the thief had been prosecuted and convicted for stealing the cycle. In such a case cogent evidence of ownership would have been produced to you. If, on the other hand, John Doe refuted the allegation that the cycle was stolen and claimed that he had a good title or right to sell you the bicycle, it would be reasonable to defend the proceedings brought against you in order that the Courts might decide the issue. If John Doe was impecunious, it would not, of course, necessarily be wise to rely upon his assurances, unless you were yourself satisfied that they were well founded. If you resist a claim and lose an action, you usually have to pay your opponent's costs of the proceedings as well as your own. If John Doe was a man of straw, your subsequent claim against him for reimbursement of the costs might be valueless.

An exception to the general rule which requires a purchaser to return stolen goods arises on a sale and purchase in what is known as 'market overt'—*i.e.*, open market. An open market is an established public market, and if the sale takes place

during authorised days and hours, a purchaser in good faith of goods which prove to have been stolen is under no obligation to return them until the thief has been prosecuted to conviction.

(2) There is an implied representation when a dealer sells goods by description that they shall, in fact, correspond with that description. I may purchase a clock which I see described in a catalogue as 'an eight-day clock', and on its arrival I find that it requires winding every twenty-four hours. It does not correspond with the description, and as 'eight day' is a representation which goes to the root of the contract, it is a condition of the contract, and its breach entitles me to reject the clock and demand the return of my money. Alternatively, I may demand from the seller what he had offered to sell and I had agreed to buy—viz., an eight-day clock—and, if the seller fails to deliver a clock of this character I may sue him for damages. My damages would normally be the difference between the price of an eight-day clock which is as near to the seller's description as I am able to procure, and the advertised price in the catalogue.

(3) A dealer, generally speaking, is not obliged to disclose the defects attaching to any particular article which he sells. The purchaser must look after his own interests. If, however, I inform a trader who specialises in the sale of a particular class of goods that I require goods of that class for a particular purpose, I am entitled to rely upon his skill and judgment and there is an implied condition that the goods will be reasonably fit for that purpose. For example, I may wish to start in the business of dog-breeding. If I communicate with a breeder, and inform him of this desire, I am entitled to assume that any bitches I purchase from him are suitable for breeding purposes. If, on their arrival, I ascertain he has sold me mongrels and not pedigree bitches, they would be useless for breeding, and I might return them. He is not entitled to 'sell me a pup'.

A similar responsibility is imposed upon a trader who deals in a particular class of goods, and in such a case there is an implied condition, when the goods are sold by description,

that they shall be of merchantable quality. For example, if you purchase a cycle recommended to you by a cycle dealer, the law requires the cycle to be of merchantable quality, and if it collapses under you when you are out cycling, and you are injured, you are entitled to claim compensation. If, however, you see a bicycle in a shop window, and you say to the cycle dealer: 'I want that bicycle which you have in your window,' and he replies: 'Very good, sir; twelve pounds, please', it is not a sale by description, and it is a case to which the maxim 'Caveat emptor' will apply. You will note, however, that the obligation applies only to a trader who makes it part of his general business to deal in such goods. If you purchase a second-hand bicycle from a private seller you have no remedy if the bicycle is defective. Moreover, a trader may also be exempt from liability if he sells you goods under a trade name, or goods which he himself has no reasonable chance to examine. For example, a grocer would not normally be liable to the purchaser of a branded food product called, say, 'Roedoe', if the contents of a particular tin brought on an attack of ptomaine poisoning. He could disclaim responsibility, both because the sale took place under a trade name, and also because he had no reasonable chance of inspecting the contents of the sealed tin. Liability might however, arise, if the seller had expressly recommended the purchaser to buy the goods sold under the trade name, and the exemption would not extend to the manufacturer, who might in certain circumstances be sued with reasonable prospects of success.

(4) The fourth representation is deemed to arise only when there is a sale by sample. In such a case there is a condition that the bulk shall correspond with the sample in quality, and the buyer must be allowed a reasonable opportunity of comparing the bulk with the sample. If you select material from a pattern shown to you by a tailor, he is not subsequently entitled to sell you a material which has an identical design, if it is not also of the same quality. If he does so, you may reject it.

The quantum, or amount, of the damage which you are entitled to claim upon a breach of any of these implied conditions or warranties, and which may be either additional or alternative to your right of rejection, is assessed in the manner described in Chapter 2. Before, however, you embark upon the good ship Litigation you should remember that there is always danger of storms and tempests, and you may have a rough passage before you are able to bring your cargo of damage safely into port, even if the ship does not founder or turn turtle in mid-ocean.

The sale or purchase of an article is effected in two stages. The first stage is the agreement to buy and sell, and the second stage is the actual delivery of the article.

The two acts may sometimes be simultaneous, but are not necessarily so. You may agree to buy a cycle, and the dealer may agree to effect certain necessary repairs to the machine before delivery. The first stage is the agreement to purchase. This agreement is not enforceable unless all the terms are agreed. There must be no conditions left outstanding for further discussion, or there will be no contract. Moreover, you will recollect the rule stated in Chapter 3 that a contract for the sale of goods over £10 in value must be evidenced in a signed memorandum unless there are acts which amount in law to part performance of the contract. When a contract has reached the first stage, but has not been completed by delivery of the goods, it is said to be 'executory'. The contract is completed, or executed, when the goods agreed to be purchased, or the documents of title to the goods, are delivered, and delivery means a formal acceptance after tender—*i.e.*, a formal offer for acceptance.

A common case in which documents of title are delivered, instead of the goods themselves, occurs when goods are shipped to the purchaser. In such a case, the documents of title are called Bills of Lading, and they are either made out in the name of the purchaser, or endorsed over to him or to his order. When these bills are tendered to the purchaser, and he accepts them, the legal consequences are the same as if he had taken actual delivery of the goods.

Further references to 'delivery' of goods in this chapter include, accordingly, the delivery of the documents of title in relevant cases.

When you agree to purchase goods, many things may happen to them between the date of the agreement and the date of delivery. They may, for instance, be destroyed by accidental fire or other unavoidable cause. The burden of the loss between the vendor and yourself in such a case depends on whether the legal ownership in the goods has passed to you or still remains with the vendor. This is partly a question of law and partly a question of fact which turns on the circumstances of each individual case.

For example, when you agree to make a purchase of goods, such goods may consist of an article or articles which are identified, or they may consist of merchandise which cannot be immediately identified. If you agree to buy a specified piano, it is identified immediately the agreement is made. If, on the other hand, you agree to buy 3 cwt. of coal to be delivered to you on the following day, you cannot go into your coal merchant's yard and identify the particular 3 cwt. of coal which is to be assembled to satisfy the agreement. The identification can take place only after the coal has been gathered in sacks, or loaded on a van for delivery.

Identification of goods agreed to be purchased has a very important bearing on the question of legal ownership, because such ownership normally depends on whether or not the goods have been 'appropriated' to the contract of sale. Unidentified goods cannot be appropriated, but the general rule is that goods agreed to be sold are appropriated to the contract as soon as they are identified, and as soon as they are appropriated the property in them passes to the purchaser, and he becomes the legal owner.

In these circumstances the accidental loss of goods destroyed after an agreement to purchase, and before delivery has been effected, normally falls upon the vendor in the case of unidentified or unappropriated goods, but the purchaser must bear the loss in the case of identified or appropriated goods.

These rules do not necessarily apply if the goods are destroyed or damaged as a result of negligence, as distinct from unavoidable accident. In such a case the usual rules applicable to negligence may be applied. Even though the property has passed to the purchaser, and he is therefore the legal owner, he may claim from the seller, as damages for negligence, an amount equivalent to his loss.

Goods are not always paid for in cash, and in the case of credit transactions, questions may arise as to the legal rights of an unpaid seller. What is the legal position if you have agreed to sell a piano to John Doe, and before the piano is delivered, or before you have been paid the purchase price, John Doe is made bankrupt? Are you bound to deliver the piano, or may you keep it until your account has been paid? You will not be able to contend successfully that it is your piano. The property in it has passed to John Doe as from the date when the piano was 'appropriated' to the contract. You are not normally entitled to retain property which belongs to a third party, and if you do so you may be sued for delivery up of the property and also for damages for detinue, *i.e.*, its detention, or for damages for conversion, which is legally defined as being any act in relation to property which is inconsistent with the rights of the true owner. Must you, then, deliver the piano, although you may have no prospect of receiving payment? The answer may be in the negative, for you may have what is legally termed the 'lien of an unpaid seller'. Lien is a subject which is considered in Chapter 8. Although you are no longer the legal owner of the goods, the law entitles you to retain them in your custody, in this instance, until you have been paid the purchase price.

Your lien or right to retain the goods as an unpaid seller may even be enforced by you after you have parted with the piano, if it has not actually been delivered to the purchaser. You may reclaim the piano if it is in the hands of the railway or any other carrier in process of delivery, because it is 'based on the plain reason of justice and equity that one man's goods shall not be applied to the payment of another

man's debts'. The right of the unpaid seller to a lien may, however, only be set up against the purchaser personally. If John Doe is the purchaser of the piano, but you have been instructed by him to deliver it to Richard Roe, because he has resold it, you cannot reclaim it, in order to enforce the lien, after it has left your premises.

If you have sold a piano to John Doe, but he does not want it delivered to him until he moves into a new house, he cannot later repudiate the bargain if he changes his plans and does not acquire his new house. In such a case you would be entitled to maintain an action for the price of the piano, and it would remain John Doe's property to be held by you to his order. If, however, you prefer to accept the repudiation, you are at liberty to do so. In that case you would be entitled to keep the piano and maintain an action for damages for any loss you may have suffered. Your normal loss would be the loss of the profit which you would have earned, if John Doe had carried out his contract, less any profit you receive on a second sale.

The provisions of the Sale of Goods Act 1893 which have been considered do not, in general, apply to hire-purchase agreements.

Goods are frequently sold on agreements known as hire-purchase agreements. The essence of a hire-purchase agreement is that the goods are on hire only, and that the property in them is not to pass to the customer or hirer until the final instalment of the purchase price has been paid. Until the final instalment is paid the goods are the property of the Storcs, who have hired them to the customer.

The law relating to hire purchase was drastically altered shortly before the War. Prior thereto some traders had abused their rights under hire-purchase agreements. They reclaimed goods and forfeited all money paid under the hire-purchase agreement when default was made by purchasers in payment of a single instalment of the agreed purchase price.

For example, if John Doe had bought a piano on hire purchase for £80, and had paid £75 by instalments, he might

have lost the piano and his £75 if he had defaulted in payment of the final instalment of £5. It was the practice for the trader to retain this right under the terms of his agreement with John Doe, and an unscrupulous trader would readily avail himself of it. There were also cases in which a grossly inflated purchase price was charged for goods purchased on hire purchase. A customer might be attracted by a suite of furniture worth £40. The trader would have been willing to sell it for £40, but as the customer was buying on hire purchase, the price asked might be £2 a month for three years. £2 a month for a suite of furniture sounds a modest figure to a person who is not mathematically minded. Calculation shows, however, that a regular payment of £2 a month amounts to £72 in three years. The customer accepting such an offer would accordingly pay £72 for goods which he might purchase in cash for £40.

These abuses have now been countered by the sweeping provisions of the Hire Purchase Act 1938. The chief defect of the Act is that it applies only to transactions which even at that date might have been considered modest. The present fantastic prices charged for many essential household goods must go far towards making the Act a dead letter in many instances when its provisions would otherwise have been of inestimable value.

The Act applies to all hire-purchase agreements and 'credit sale' agreements where, in the case of ordinary household effects, the hire-purchase price or total purchase price does not exceed £100. In the case of a motor vehicle the figure is £50. A 'credit sale' agreement is defined as an agreement in which the purchase price is payable by five or more instalments.

Under the provisions of the Act, if you propose to purchase a piano for £80 by instalments, the trader is obliged, before making any hire-purchase agreement, to inform you in writing of the price at which you may purchase the piano in cash. There must also be a memorandum signed by all parties which sets out the hire-purchase price, the cash price, the amount and date of each instalment due, a schedule of

the goods sold, and a notice which sets out clearly the more important rights of both parties to the agreement. A copy of this memorandum must be supplied to the hirer within seven days of the making of the agreement. If the owner does not comply with these conditions he may forfeit his rights under the agreement. Conditions of a similar character are made in the Act regarding credit sales agreements.

In the case of a hire-purchase agreement, the hirer has a right by the Act to terminate the agreement on payment of the instalments due together with such sum, if any, as will make his total payment not less than one-half of the total hire-purchase price, unless a lesser sum is specified in the agreement, and if the owner includes any provision in the agreement for a larger payment, such a provision is void. The hirer is, however, liable to pay damages if he fails to take reasonable care of the goods, and the Court may order him to deliver up the goods if he retains them wrongfully.

A number of provisions which had frequently been included in hire-purchase agreements are in future declared to be void. They include provisions which entitled the owner to enter premises for the purpose of seizing the goods, and which imposed additional liabilities on the hirer.

The owner is required to supply the hirer at any time on demand, and on tender of the sum of 1s., with the fullest information regarding the agreement and the balance still due under the agreement. If the owner fails to comply with this demand he may substantially lose his rights under the agreement, and may be subject to a penalty of £10. The hirer is subject to a similar penalty if he fails to reply to the owner's request for information as to the whereabouts of the hired goods.

Further protection is given to the hirer by the provision that if he has paid a sum equal to or in excess of one-third of the hire-purchase price, the owner must not take any step to recover possession of the goods in the event of default, except through the Courts, or unless the hirer has terminated the agreement. If the owner acts illegally in this respect the agreement is treated as being at an end. The hirer can

then recover all payments made by him under the agreement.

It is to be hoped that time will be found by the Government at an early date to pass a short amending Act, which will extend the existing provisions and make them applicable to contracts for hire purchase at prices which bear some relation to existing market values.

FIRMS AND PARTNERSHIPS

'The ugliest of trades have their moments of pleasure. Now, if I were a grave digger, or even a hangman, there are some people I could work for with a great deal of enjoyment.'

D. W. Jerrold

If you decide to 'run a business', you may open it in your own name, or you may do so in the name of a firm. You may operate it as an individual, or you may do so in partnership with one or more of your friends or business acquaintances. You may also organise it in the form of a limited company, and become a director. In that event the Company will in some respects occupy the same position as if it were your employer, and as a director of the Company you will, generally speaking, be its agent, even although you may have complete control over its operations. The structure of a limited company is dealt with in Chapters 19 and 20.

If you decide to carry on business in your own name you may do so without particular formality, but if you carry on business in a name other than your own, you must, by the provisions of the Registration of Business Names Act 1916, register particulars of the business in the office of a Government official called the Registrar of Business Names. You must also have your name printed as the owner of the business on all your business communications, including invoices. These provisions are designed to enable every person to know the name of the individual with whom he is dealing. The Register of Business Names, which is normally kept in London, may be inspected by any member of the public on payment of a small fee. If you enter into a contract with 'John Doe and Company' you are entitled to know if you are making a bargain with John Doe, or with Joan Doe, his wife. Before the Register of Business Names was established, it was easy for John Doe to lead his creditors to believe he was the owner of a business which belonged, in fact, to his wife. In

such a case a creditor might have sued John Doe, believing him to be the proprietor of the business, and, after he had obtained judgment, and had attempted to enforce the judgment by an 'execution' levied against the assets of the business—a subject dealt with later in this chapter—Joan Doe would claim all these assets. The creditor would then have to withdraw the execution, and in many instances he lost his money.

The particulars furnished to the Registrar must now, however, disclose the name of the owner of the business. If a supplier is unable to obtain payment for goods supplied, he is then able to sue the owner, and he is able to enforce his judgment against the assets of the business which belong to the owner.

When John Doe does not wish to disclose his identity as the owner of a business, he may purchase it in the name of a third person, who is said, in law, to be his nominee. Sometimes the fact that a man is acting as a nominee, and the name of his principal, are both concealed. At other times he is openly identified as a nominee, but the name of his principal is not disclosed. The principal who appoints the nominee may have no improper motive in wishing to conceal his identity. It is indeed a common practice for a shareholder in a limited company to purchase shares in the name of a nominee, so that the public will not be able to identify his interest in the Company.

There is, nevertheless, increasing concern at the abuse to which the practice lends itself. It enables a man with extensive business interests to conceal his activities as well as his associations, and his motives may not always be unimpeachable. A Government committee appointed to consider Company Law reform, which published its report in 1945, strongly criticised certain features of nominee shareholdings, and the Government proposes to give statutory effect to these recommendations. This will not, however, result in a complete abolition of the system.

An example will help illustrate the disadvantages of the device in commerce. If you and John Doe are both in

business as greengrocers, and you carry on business a few doors away from each other, there will, no doubt, be legitimate competition between you. You may be in the habit of purchasing your supplies from a wholesaler called Richard Roe. You have no means of knowing that John Doe is, in fact, a nominee of Richard Roe. A wholesaler will frequently open a retail business in the name of a nominee, and in this instance it will mean you are purchasing your supplies from a rival trader. Imagination can suggest who will obtain first priority when goods are in short supply, and if you knew the facts, you would, no doubt, seek another market for your purchases. You may consider it unfair for Richard Roe to carry on both a wholesale and a retail business in this way. There is, however, nothing illegal in his doing so.

When you open up a new business you watch it, week by week, with some anxiety, to observe whether or not it is going to prosper. You are relieved if you see the takings increase progressively, and if you are able to claim, at the end of a year, that the business is firmly established.

When this occurs, you have created something of value by your personal efforts. If, as a result of some misfortune, you are unable to carry on the business, you will not necessarily have to close it down, and lose the fruits of your efforts without compensation. You will be able to sell it to a purchaser and require payment for it. The payment would be made for what is called 'goodwill'. It may have a great value in the case of an old-established business, but if you are the purchaser, and not the seller, there are many pitfalls you must avoid when you buy the goodwill of a business. Some of these are dealt with in Chapter 12. There is no yardstick to be applied in assessing the value of goodwill. It must depend on a large number of factors, and if you propose either to sell or to buy a business, the only safe course to adopt is to place all the facts and figures relating to the business before a qualified accountant. After he has considered them, he may be in a position to express an opinion as to a fair value which ought to be paid or received for the goodwill.

If you are proposing to purchase a business, it is also essential that you should satisfy yourself that all necessary licences have been obtained under the existing regulations to enable you to carry on the business. Some of these have now been relaxed, but there are others which are still in force, and unless you are careful, you may find, after you have paid your money, that you cannot carry on the business because it infringes an unrepealed wartime regulation.

In Chapter 12 reference is made to the necessity of having a proper agreement, when you purchase a business, to safeguard yourself against a vendor who might desire to open a competing business on adjoining premises after the completion of the sale.

If you are the owner of a business, and occupy your own business premises under a lease, there are important provisions in an Act called the Landlord and Tenant Act 1927 which may affect you. If you have carried on the business on the same premises for a number of years, you are entitled, if your lease or tenancy agreement is about to expire, or if you receive notice from your landlord to quit the premises, to demand, in certain circumstances, either a new lease of the premises, or compensation for being required to quit. This Act is the first effort made by the law to protect the owner of a business who has built up a goodwill. The regulations, however, which govern your rights are highly technical. If you are holding the premises under a lease, you must apply to the landlord for a new lease at least twelve months before your old lease expires. If you are holding under a tenancy agreement and you are served with a notice to quit, you must give notice of your intention to exercise your rights under the Act without delay. You should, accordingly, immediately seek advice, as if you are dilatory you may find that you are too late, and have forfeited your claim either to a new lease or to compensation. In any event, it is not wise to be too optimistic as to your rights. They are, generally speaking, designed to prevent your landlord from exploiting your goodwill for his benefit, and without payment of compensation. If the landlord does not propose to carry on a

similar business, but intends to use the premises for some totally different purpose, you may have no right either to a new lease or to compensation.

If you decide to start a business jointly with a friend or business acquaintance, he will generally be known to the law as your partner. Partnership is the 'relation which subsists between two or more persons' carrying on business in common with a view of profit'. Partners also have to share losses. If you are inexperienced, and your friend is equally lacking in knowledge of the particular trade you have both selected, you are more likely to suffer losses than to make profits, and unless you are cautious you may find your steps leading you to the Bankruptcy Court. Enterprise should never be discouraged, but enterprise and experience are usually essential 'partners' for success.

Partnership is a contractual relationship—i.e., it is founded upon an agreement between the partners to carry on business together under specified terms and conditions. The individuals who have entered into partnership with each other are called collectively a firm. The name under which their business is carried on is known as the firm name. A firm must comply with the requirements of registration under the Registration of Business Names Act 1916. It must disclose the names of the partners, unless the firm consists of all their names without other addition. John Doe and John Doe, Junior, his son, may trade under the firm name of 'John Doe and Son' without registration. If they trade under the name of 'John Doe and Company' they must, however, register. Except in those cases dealt with in Chapters 19 and 20 when a company is a corporation and must use the word 'Limited' or 'Ltd.' as part of its title, the word 'company' used as part of a trading name is without legal significance. 'John Doe and Sons', and 'John Doe and Company' are both names under which a firm may operate, and when we speak of 'Company Law' we do not refer to business firms of this character.

Moreover, although we speak of a partnership as a 'firm', the law does not recognise a firm as having any legal existence,

beyond a power to sue and to be sued in the firm name. It is only a matter of convenience to refer to the rights and liabilities of a firm. The rights are legally the rights of the owner or of the partners collectively. The liabilities are legally the liabilities of the owner or of the partners individually. It is essential to remember this whenever reference is made to 'a firm'.

The mutual rights and obligations of partners and their responsibility individually and collectively to their customers and members of the public are important matters.

John Doe and Richard Roe have entered into the partnership business of outfitters, and trade as John Doe and Company. John Doe and Richard Roe have agreed between themselves that Richard Roe will purchase all the supplies which are required by the business. In breach of this agreement, John Doe interviews a traveller and purchases some shirts ostensibly for the firm, but in reality for himself. If he fails to pay for them, can the traveller require the firm to do so? In order to obtain the answer you must apply the rule which would be relevant if similar circumstances arose in the case of a principal and agent. You will recollect from the previous chapter that the principal is, generally speaking, responsible for the acts of his agent committed within the scope of his actual or implied authority. Every partner is an agent of the firm and has express or implied authority to enter into contracts on behalf of the firm. Therefore, if John Doe defrauds his partner in this way, the partner and not the traveller must suffer. Provided the latter has acted in good faith, he can require the firm to pay him for the shirts. At the same time, Richard Roe could, of course, require John Doe to reimburse him the loss which he, Richard Roe, has suffered when the firm has been required to pay John Doe's personal debt. On the other hand, the same firm would not normally be liable if John Doe, as one of its partners, purchased some groceries in the firm name. Such a purchase would not be within the apparent scope of the partnership business of outfitters, and the responsibility of a firm for acts done by any one of its partners is strictly confined to

business transactions. The firm is not liable for a partner's private debts, contracted outside the actual or apparent scope of the business.

By application of the same principles, the firm would be compelled to deliver shirts which had been purchased by a customer, if John Doe had received payment from the customer for the shirts, but had failed to account to the firm for the purchase price. Payment to a partner in a firm for a debt owing to the firm is almost invariably a good discharge for the debt.

John Doe can involve his firm in financial loss in many ways additional to those already considered. They not only arise when he acts in breach of his primary obligation to act faithfully towards his partner. They may also occur when he is acting in good faith. For example, if John Doe is delivering goods in a car which belongs to the firm, and in the course of his journey, he knocks down and injures a pedestrian as a result of negligent driving, John Doe and Company may be liable to pay compensation. This subject was discussed in Chapter 2. John Doe and Company will not, however, be liable if John Doe was engaged on his own private affairs at the time of the accident, and was not driving on the firm's business, for the firm is only liable for the consequences of any act of negligence by one of its partners which is committed within the scope of his duty as a partner.

If a creditor makes a claim against a firm, and subsequently obtains judgment against them, he may enforce it against the assets of the firm. He is not, however, compelled to do so. He may sometimes enforce the judgment against a partner personally, for a partner is always liable to the full extent of his private assets for any debts of the partnership. He may do so either when the partner has entered an appearance to any legal proceedings which have been commenced and has admitted he is a partner, or when he has been served with a writ or a summons, and has not denied his status as a partner. If one partner pays up the full amount of a debt due from the firm out of his own pocket, he is

entitled to call upon each of his partners to repay him by way of contribution, a proportion of the amount which he has paid.

If a creditor decides to enforce a judgment against the firm, and not against an individual partner, he may instruct the sheriff's officer to take possession of all plant, machinery, stock in trade, or office furniture which belongs to the firm. This process of instructing the sheriff's officer is called 'levying execution'. The creditor is also entitled to take bankruptcy proceedings against the firm, and if it is made bankrupt, all the assets of the firm will pass to the Trustee in Bankruptcy. The Trustee will sell these assets, in order to pay the debts, but if they do not realise sufficient to pay all the creditors in full, the Trustees may call upon each partner to make up the deficiency out of his private assets. If a partner fails to do so, he may, in his turn, be made bankrupt. The subject of bankruptcy is dealt with in Chapter 21.

If a partner retires from the partnership, he should notify all those who have had dealings with the firm that he is no longer associated with it. If he fails to do so, he may find himself estopped by his conduct from repudiating liability for the debts of the firm, incurred after he has ceased to be a partner, and he may be called upon to meet them. If members of the public have been trading with the firm of 'John Doe and Company', knowing John Doe is a partner, they are entitled to believe that he remains a partner and, accordingly, liable for the debts of the firm, until such time as they are notified of his retirement. If the business continues to be carried on in the name of John Doe and Company, John Doe will, however, not be under liability to an old customer for any debts arising from new contracts made with the firm after the customer has received notice of his retirement, or to any new customer who deals with the firm for the first time after the date of his retirement.

Although a written agreement is not essential to establish the terms of a partnership, and a verbal agreement is legal and enforceable, it is desirable for the express rights and obligations of each of the partners to be defined in writing. If they are not so defined, but are left to be inferred, it substantially

increases the risk of subsequent disagreement. Haphazard business methods are in many cases responsible for litigation, and the greater the care taken to define business relations, the less will be the probability of subsequent friction.

Many of the terms of an agreement between partners will be dictated by common sense. What is to be the scope of the partnership business? What is to be the function of each partner? How much capital is to be employed in the business? In what proportions are the partners to contribute the capital? In what proportions are profits and losses to be shared? Who is to keep the necessary books of account? Who are to be the bankers of the partnership? How often are the accounts of the partnership to be prepared? How long is the partnership to last? What right is each partner to have to terminate the partnership? What are to be the rights of the survivor in the event of the death of a partner? What steps are to be taken to wind up the affairs of the partnership after dissolution? These are some of the important questions which ought to be considered by the partners before the partnership commences.

If there is no express agreement between the partners, the Partnership Act 1890 defines their respective legal rights. The relevant provisions of that Act, which operate in the absence of agreement, entitle each partner to share equally in the profits and losses of the business, and make each partner liable for an equal contribution towards the capital. Subject, also, to the terms of any agreement, each partner is entitled to take part in the management of the business, and if there are more than two partners, the majority may arrive at a decision which is binding on the minority.

There is one type of partnership seldom met in practice, called a limited partnership. In the case of a limited partnership, the rights of one or more of the partners are of a specified limited character. In all other cases a partner has certain statutory rights and obligations of which he cannot be deprived even by agreement. These include: (1) the right of access at any time to the books of account, which must be kept at the place of business of the partnership;

(2) the right to make copies of any entries in the books; (3) the obligation to render a true account of his dealings to each of his partners, so far as such dealings relate to the affairs of the partnership business; (4) the obligation to give each of his partners full relevant information; (5) the obligation not to employ the assets of the firm for his own private use without the consent of his partners. If he does so, he must pay over to the firm any profit, and suffer personally any loss.

These rights and obligations arise from the legal responsibilities which rest upon every individual who owns, or partly owns, a business. It is, for example, obvious that a partner could not comply with his legal obligation to make proper income tax returns if he did not have access to the books of the partnership. Moreover, an offence is committed under the Bankruptcy Act if a bankrupt has not kept proper books of account. Apart from these considerations, however, each of these points is fundamental to the existence of the mutual trust which should prevail between partners.

If an agreement between partners does not specify the duration of the partnership, it will continue for such time as all the partners are in agreement. In the event of disagreement, any partner may dissolve the partnership at any time without previous notice, whilst if the partnership has been formed with the object of carrying out some express purpose it will come to an end when that purpose has been fulfilled. A partnership which continues after the time originally agreed is determinable at any time by any partner, but a partnership for a fixed term, which has not expired, can only be terminated either by the death or bankruptcy of a partner, or by agreement, or by an Order from the Court. If the dissolution follows death or bankruptcy, the assets of the deceased or bankrupt partner may be utilised to make good any deficiency in the assets of the firm, in respect of debts incurred by the firm, prior to such death or bankruptcy.

Subject to the terms of any agreement, the accounts of a partnership are usually taken annually. After a dissolution, the accounts must be made up to the date of the dissolution.

If the partners are in agreement, they may themselves appoint a Receiver who will wind up the partnership affairs; otherwise the Court has power to make the appointment. It is the duty of the Receiver to collect and realise all the assets of the firm, to discharge the liabilities, and thereafter to distribute any surplus among the partners according to their respective shares.

There are a number of circumstances in which the Court has power to order a dissolution of partnership. These include the following :

(1) When a partner is permanently incapable of performing his duties as a partner.

(2) When a partner has been guilty of conduct calculated to injure the partnership business.

(3) When a partner has persistently or wilfully broken the partnership agreement.

(4) When a partner has so conducted himself in partnership matters that it is not reasonably practicable for his partners to continue to carry on business with him.

(5) When the partnership can only be carried on at a loss.

The Court also has a general jurisdiction to dissolve a partnership whenever it is 'just and equitable' that it should do so. The Court will usually exercise this power if the partners have disputes of such a serious character as to make it virtually impossible for the partnership business to continue.

To avoid the necessity of litigation, partnership agreements frequently contain a clause by which the partners agree, in the event of a dispute arising between them, that such dispute shall be referred to arbitration. The subject of arbitration is dealt with in Chapter 31.

This chapter should help you to appreciate that if you enter into a partnership you are undertaking a serious responsibility. A dishonest partner, as well as an incompetent one, can bring you to ruin. It is therefore of vital importance not to enter into any partnership without careful thought. It is rarely wise to buy a share in a partnership in answer to an advertise-

ment, or to advertise for a partner. If you adopt the method of advertisement, it is difficult to satisfy yourself beyond reasonable doubt of the honesty of your proposed partner. There are some dishonest persons who make a practice of inserting and answering advertisements for partners. The results are always disastrous for the unfortunate individuals who have dealings with them. If you wish to enter into a partnership, you should choose as your partner a man of experience whom you have known for many years. You should be in a position to trust him of your own personal knowledge, and to know that if you start business together you will be setting sail in a fair wind.

TRAVELLERS, CARRIERS, INNKEEPERS, LIENS, AND INSURANCE

'Note: Foggy weather—On occasion when foggy weather prevails . . . the Company will do what is practicable to provide for the comfort and convenience of passengers.'

Extract from L.M.S. Bye-laws

It will be a pleasure to travellers to learn from the extract quoted above of the consideration which is given by the railways to their plight in foggy weather. They will, however, sometimes wonder why they do not receive similar consideration when the weather is not foggy. Is it due to the fact that railways so often appear to operate in a state of perpetual fog?

Every time you travel on a railway there is a special contract between the railway company and yourself. The terms of the contract are dictated by the railway company, and if you take a ticket you must travel on those terms, for although you have a right to express any opinion you choose on them, it won't get you anywhere, unless your language is sufficiently violent to land you in a Police Court!

Railways, theoretically, have no monopoly rights in this country, and they may be nationalised at an early date. For practical purposes, the ordinary passenger has little alternative but to go by rail, if his business or pleasure takes him from one part of the country to another. If you had alternative forms of transport you could not reasonably complain if a railway company said, 'We will carry you to Snailham, on such conditions as we elect to impose, and on no other conditions.' If you did not like these conditions, you would be free to avail yourself of one of the alternative forms of travel. When, however, no such alternative is open to you, it may appear unreasonable that a railway company should be entitled to impose its own travel conditions. It is true that railways act only under powers which have been

given to them by the Government, but they have been allowed very wide discretion in the exercise of these powers. The terms and conditions under which a railway company permits you to travel are called the 'Bye-Laws and Regulations of the Company'. They are exhibited at all railway stations in the country, but the average traveller is ignorant of their contents, for they are printed in small and inconspicuous type, and in many cases are flyblown. Moreover, passengers do not form queues at the booking offices to enable them to consider these laws before they purchase their tickets. It would scarcely be profitable to do so, since they are as the laws of the Medes and the Persians. Nevertheless, your travelling or cloakroom ticket will usually be endorsed with the words 'Issued and accepted on the bye-laws, regulations and conditions published in the Company's Bills and Notices'. If you deposit your luggage in the company's cloakroom, you will pay a fee for the deposit, but if your luggage is lost and you claim compensation you may be confronted with this regulation:

'The Company shall not be liable for loss, misdelivery, or detention of or damage to

(a) Any article or property which separately or in the aggregate exceeds the value of £5, unless at the time of deposit the true value and nature thereof shall have been declared by the depositor and 1d. per £ sterling of the declared value paid for each day or part of a day in addition to the ordinary cloak room charges, and such loss, misdelivery, detention or damage shall be proved to have been occasioned by the negligence of the Company's servants.

(b) Any articles or property which separately or in the aggregate do not exceed the value of £5, unless such loss, misdelivery, detention or damage shall be proved to have been occasioned by the negligence of the Company's servants.'

This means that although the Company exacts a payment for the cloak-room charge, it will not pay you any com-

pensation if it loses your luggage, unless, in the case of luggage of an aggregate value in excess of £5, you have complied with conditions of which nearly every passenger is wholly ignorant, *and* unless, in addition, and even if the value of the luggage is less than £5, you are able to prove the loss to be due to the negligence of the Company's servants—in most cases an impossible proposition.

You are always bound by the bye-laws, unless the small-type endorsement on your ticket has by inadvertence been omitted or is illegible. In such a case they do not form part of the contract, and if they do not form part of the contract, you are not bound by them.

Of course, if the bye-laws were all reasonable there would be no ground for legitimate complaint. In theory, the conditions are required to be reasonable, and if they are not reasonable the public has the right to contest their validity by litigation, but litigation against a powerful organisation is not usually good business.

In practice, it must be conceded that travelling would be impossible if travel terms and conditions were discussed between the traveller and the Company every time a ticket was issued. It would not, however, be impossible for a railway company to co-operate with a committee of ticket-holders in framing conditions of transport which would take the passengers' point of view into consideration, and would be fair and reasonable to both parties. Railways do not show any striking sense of their responsibility in this respect.

Here are some points of railway law which operate unfairly on the passenger :—

(1) Railways, of course, disclaim all responsibility for unpunctuality. No one can reasonably argue that a company ought to meet claims arising from unpunctuality beyond the reasonable control of the Company. Sometimes, however, the delays are not inevitable. If railways were penalised for wilful delay occasioned by inefficiency and incompetence, they would quickly learn the royal art of punctuality.

(2) If you forget your season ticket on any particular occasion, the Inspector will demand payment of your fare.

This demand is made pursuant to a bye-law. You will be told you are guilty of a breach of the term of the contract, which requires you to produce your ticket on demand. Although you will recollect that the general rule is that the only damage recoverable for a breach of contract is the actual loss suffered, and the Company suffers no loss by your failure to produce your ticket, you will be pressed for payment of the full fare. If, however, you are courageous and public-spirited enough to contest the claim, the Company may decide it is bad policy to invoke the publicity of Court proceedings, and may abandon the claim for double payment, for nothing so annoys a railway company as exposure of sharp practice in the Press. This does not mean that it is reasonable to travel without a ticket with the intention of evading payment of your fare. This is a criminal offence, and you have no right to complain if the Company issues a summons against you, and you are required to appear at a Police Court. You are not entitled to defraud the railway because it is a large corporation, or because it has unreasonable regulations.

(3) The Company may decline to pay compensation to a passenger who is travelling with a workman's ticket, or any other ticket on which a cheap fare has been paid, if he is injured in a railway accident. It expressly excuses itself from its legal obligation to pay compensation in such circumstances by the terms of its bye-laws. A legal obligation to pay damages to injured persons will normally arise after a collision, as the usual rule which requires an injured person to prove negligence is reversed. The law will assume, without legal proof, that the accident is due to a failure of an employee of the Company to exercise proper care, and there is no obligation to prove negligence. This assumption is based on the doctrine known as '*Res ipsa loquitur*',—i.e., 'the thing speaks for itself'. If, in fact, there is evidence to prove that the accident was not due to any fault on the part of the Company, *e.g.*, if a trespasser had deliberately interfered with the signals, the assumption may be rebutted, but normally this is not an easy matter, and the Company does not attempt it. You may accordingly guess the reason for

the announcement so frequently made by a railway company after an accident that it will meet all claims. This does not mean that you will be entitled to claim compensation if you are injured when you get out of the train when it is in motion, or if you lean your head out of the window and are struck by an object projecting on to the line. You have no right to act in this way, and it is negligent to do so.

(4) If you arrive at a station with luggage and a railway porter takes it, and negligently drops it on the line or otherwise damages it, the Company may repudiate your claim for damages, because under the bye-laws the porter is your agent, and the Company repudiates any liability for his acts until such time as the luggage has officially passed into its custody by being labelled or placed in the luggage van.

These, and many other fences erected by the Company, nearly always put the passenger out of bounds, and in this way they offend modern ideas of business ethics. Railways have spoken much about a 'square deal', without apparently appreciating that a square deal requires an equal distribution of the cards. At present some of the railway companies keep the aces, and give the passengers the low cards. They are great corporations, and should give a lead to the public who have, individually, neither wealth, power nor influence. Perhaps when the railways put their own house in order, they will have less reason to complain of the fantastic bills which they have to meet each year for loss and pilferage. Most people know it is despicable to cheat, but they feel no qualms of conscience if they do so as an attempt at retaliation for a legitimate grievance.

When you have goods conveyed by rail, water or air, the carrier of the goods must assume certain legal obligations which are imposed by Statute. Carriers of goods are classified by the law either as being 'common carriers' or 'private carriers'. Railway companies and all other transport companies are included in the former category, and a common carrier must carry the goods of any person who is willing to pay his proper charges, unless there are valid grounds for refusal. His proper charges must be reasonable, and he is not entitled

to show priority to or preference for one customer over another. If the goods are duly delivered to him for carriage in the course of his business, he must take them by the most direct route that is practicable and without unnecessary delay. When he has received the goods, it is his obligation to deliver them in the same condition as they are received. It is not necessary for the claimant to prove negligence, if the carrier fails to deliver the goods or delivers them in a damaged condition. The law implies a warranty on his part to carry them safely and securely, and to deliver them in accordance with the obligations of the contract. He is only relieved from this obligation if the failure to deliver arises from an act of God or the King's enemies, or if it is due to an act of the consignor or sender, or inherent defect or the nature of the thing carried. It is, however, the duty of the consignor to declare the value of the goods, and to pay an appropriate charge for the carriage if he wishes, in the event of loss, to claim a sum in excess of £10 for any article which is lost. This is the maximum liability of the carrier for each package, if he does not do so. A common carrier is entitled to include special conditions in his contract of carriage, but they must be reasonable, or they will not be enforced. The question of what is or is not reasonable is one of fact in each instance. Common carriers are, however, entitled to claim exemption from all liability, in the event of loss, if the owner requires his goods carried at a specially reduced rate called 'owner's risk'.

A private carrier is a carrier who carries goods in special circumstances and not as part of his general trade or business. For instance, if you ask a friend to take a parcel with him on his journey to London for delivery on your behalf, he would be legally regarded as a private carrier.

The legal expression for goods delivered to common carriers or private carriers, or for goods deposited with third parties, is 'bailment', and the person who receives the goods for carriage or deposit is called the 'bailee'. There are many types of bailment, and the liability of a bailee for loss or damage may vary, or, in each instance, be defined by express

contract between the parties. If there is no express contract, the law has laid down the degree of responsibility which the bailee must assume in each instance according to the nature of the case.

The friend who takes your parcel to London for you is described as a 'gratuitous bailee'—*i.e.*, he does not expect to receive any payment for his services. A gratuitous bailee is not as a general rule liable for loss or damage except in the case of gross negligence. As he does not receive any reward for his services, he is not under any obligation to use special care. He must, however, avoid gross negligence. If your friend leaves your parcel in the train, it would almost certainly be regarded as 'gross negligence', and you might make a claim against him for compensation. From time to time we all leave parcels in trains. Before making a claim against a friend who has volunteered to carry a parcel, we must search our own conscience and decide whether or not we would wish to be charged with 'gross negligence' on these occasions.

A gratuitous bailee must not, of course, make use of articles deposited with him and employ them for his own purposes, for if he does so, and they meet with mishap, he may be liable for the loss. On the other hand, you may deposit an article with a friend and give him express permission to make use of it, and if you do so, there is a different degree of responsibility in the event of damage. For example, if you give a friend permission to use your bicycle, and he meets with an accident as a result of his negligence, he must make good any damage at his own expense. He may, however, be excused from liability if the bicycle is damaged as a result of an accident beyond his control.

If you are taking a holiday, and have surmounted the dangers and risks to which you and your luggage have been exposed, further legal relations arise when you arrive at your destination. The liability of a hotel towards its guests may be subject to special conditions which are laid down in the Innkeepers' Liability Act 1863. This provides a code for hotel-keepers, and the regulations under the Act apply

to every hotel or inn which undertakes to receive, lodge and feed travellers. A public-house which does not lodge travellers is excluded from its provisions, as is also a boarding-house or private hotel which caters for 'boarders' as distinct from 'travellers', and does not claim to open its doors to every bird of passage. Furnished apartments are also outside the scope of the Act, since they do not undertake to provide food.

A hotel under the Act is compelled to accept every traveller if accommodation is available and the traveller is able and willing to pay, and is not obviously objectionable. The proprietor must keep his guests' luggage in safety, but may limit his liability by exhibiting a specified notice in a conspicuous position on his premises.

The notice the proprietor is required to exhibit will notify his visitors that he limits his liability for loss or damage to a sum of £30, except in the case of loss or damage caused by the fault or neglect of himself or his servants, or unless the visitor's goods have been expressly deposited with him for custody. If they are so deposited, he cannot limit his liability, and he will be responsible unless the loss or damage occurs as a result of an act of God or the King's enemies. He is not, however, liable for goods which are stolen or destroyed through the visitor's own negligence, and except in a case of negligence by him or his servants, he is not liable for any injury which may be suffered by the visitor, or any damage which may be done to his clothing.

The hotel proprietor receives certain privileges in exchange for these obligations. He is entitled to demand payment of his bill from the visitor before he leaves, and if the visitor does not pay, the proprietor may detain his luggage. He is said to have a 'lien' over it. A lien is a peculiar right of the English law. It allows a man to retain property, although it does not belong to him. It is applicable only in special circumstances, either by Act of Parliament or by custom. An innkeeper, for example, has a lien, by virtue of the Innkeepers' Act, over the goods of a guest who does not pay his bill. A boarding-house proprietor has, however, no

similar lien. If a boarder proposes to leave a boarding-house without paying his bill, the proprietor is not entitled to detain his luggage. His only remedy is to sue for the amount of his bill.

If a visitor leaves a hotel which is protected by the Act without paying his bill, and the proprietor has exercised his right of lien over his luggage, the proprietor is not required to retain it indefinitely. At the expiration of six weeks he may notify the defaulting visitor, or may insert an advertisement in a newspaper, if he does not know the visitor's address, requiring him to redeem the goods within a month. If the visitor does not discharge his liability within that period, the luggage may be sold to meet the amount of the account. The innkeeper must then retain any balance, and pay it over to the visitor on demand.

An innkeeper is not the only member of the community who is privileged to exercise a lien. A craftsman, or any man who executes repairs on an article, is entitled, in the absence of agreement to the contrary, to exercise a lien over the goods on which the work has been done, and to retain them in his possession until his charges have been paid. In this case, however, he has no right of sale. That is a particular privilege given to innkeepers. In other cases when a right of lien arises, it is a mere right of possession—a right to retain the article over which the lien extends, until payment of the relevant debt. An unpaid seller of goods also has a lien in circumstances which were referred to in Chapter 6. With few exceptions, there cannot, however, be a right to exercise a lien unless the person claiming the right has in his possession the goods over which the lien is to be exercised, and also unless the amount of the debt is certain. An innkeeper cannot, for example, claim a lien for damages, if a guest damages property in the hotel and refuses to pay for repairing it. When we speak of goods being in the actual possession of the man who exercises the lien, it means the actual goods over which the right of lien arises, and it does not extend to other goods. For example, if a furniture store effects repairs to furniture, it may exercise a lien and retain

the furniture in its possession until its bill for the repairs has been paid. The lien would not extend, however, to goods which may have been deposited with the store for safe custody, for there is no lien over goods deposited for storage. Of course, a furniture store may make a special contract with the owner of the goods, and include a term in the contract which entitles it to retain the stored goods until the account has been paid. This, however, is not an example of a lien. It is a right to retain property as a result of a contract. In practice, every warehouse usually insists on including a clause in the contract which gives it this right, before it will receive goods into store. Conditions imposed by furniture depositories are frequently very arbitrary, and if you propose to store furniture, you should read with great care the contract placed before you by the warehouseman. You will find that the warehouseman will disclaim responsibility for loss which may arise under a variety of conditions, and if you wish to secure yourself against such loss, your remedy is to take out an insurance policy to cover the risks involved.

Insurance is, unfortunately, one of many subjects which must be dealt with all too briefly in this survey. A few particulars must suffice to indicate some of its salient features.

Fire, burglary and theft are three of the more usual types of risk against which insurance is sought. Life insurance is also almost a habit, whilst marine insurance is the everyday experience of those who have to deal with ships and shipping. There is one feature common to every class of insurance—viz., that it is always based on contract. In each case the terms of the contract—*i.e.*, the conditions under which payment will be made, if the misfortune occurs in respect of which the insurance has been taken—are fully set out in a document called an insurance policy. Insurance policies are issued by insurance companies, or you may in almost every case, except in respect of life insurance, insure with a curious, but large and influential body in London, called 'Lloyds'. This consists of a series of groups or syndicates, each of which is composed of a number of 'underwriters'—

i.e., men who undertake or 'underwrite' the particular risk against which the individual wishes to insure.

Mention was made above as to the wisdom of insuring against the risk of loss if you store your goods in a warehouse. When you take out an insurance, you will pay a sum, called a 'premium', to the insurers, and in return they will compensate you, if you suffer a loss, on the terms and conditions of the insurance policy which they issue.

If you wish to insure, you must, as a rule, answer a number of questions on a form, called a 'proposal form'. You must be particularly careful to answer these questions accurately, or to see that the replies are correct, if an agent fills in the form, for the answers are intended to act as a guide to the insurance company as to whether or not they will agree to insure you. If, accordingly, there is any untrue or misleading answer, you may find, if you subsequently make a claim, that the Company will be entitled to repudiate liability.

Generally speaking, insurance is a matter of 'indemnity'. It is not a trade or business out of which the insured is entitled to profit. He may recoup himself for a loss, and nothing more. Life insurance is an exception in this respect, since a man whose life may be considered by the community at large to be worthless may, nevertheless, insure it for £10,000, and on his death this sum will, normally, be paid to his personal representatives. On the other hand, if you insure a brooch against loss by theft for the sum of £1,000, when it is worth only £500, and it is subsequently stolen, you are not entitled to recover £1,000, but only the actual value of the brooch at the date of the theft.

Another salient feature of all insurance is that the insured must have what is called an 'insurable interest' in the subject-matter of the policy. This means that you are not entitled to insure another man's property, or another man's life, unless you have some definite financial stake at issue. You are, however, entitled to insure another man's property if you have lent him money on the security of the property, and you would also be entitled to insure his life if he owed you money, and you desired the policy to secure repayment of

your loan, in the event of his death before he had repaid you.

When a loss occurs it is a frequent and bitter cause for complaint that the insurance policy covers everything but the loss in question. This is not altogether the fault of the insurance company. We are given eyes and intelligence in order that we may read and understand, and if we are too lazy to read our insurance policies, or to ask for an explanation of any technical expressions which are used in the conditions, and which we do not understand, we must accept a share of the blame. On the other hand, insurance companies are also not free of fault in this respect. They usually issue their policies in a form which is not easily intelligible. The conditions of the policy are frequently printed in small type, and no trouble at all is taken, as a general rule, to make the policy comprehensible to the man in the street. It is a matter in respect of which reform is long overdue.

There are few contingencies against which it is not now possible to insure, always bearing in mind that a policy must not be taken out as a mere gamble—*e.g.*, you are not entitled to insure against the risk of the failure of the favourite to win the Derby. If you pay a premium to secure yourself against loss in such a case, you would be risking it on a contingency in which you have no active interest, beyond the loss or recovery of your money, and we shall see from Chapter 11 that this is illegal.

There is no need to add anything as to the Government's comprehensive Health and Insurance schemes, since details of these will be obtainable from any Post Office.

BANKERS, BILLS OF EXCHANGE AND PROMISSORY NOTES

'I note I am overdrawn by £7 5s. 10d., and as I have a spare cheque form, I enclose a cheque for this amount.'

Letter from Joan Doe to her Bank Manager

THE relationship between a banker and his customer is that of debtor and creditor. It is governed by the law of contract. If you open an account you agree to lend the Bank your money. It may do what it likes with it, provided it pays it back to you, or to your order, in accordance with your instructions. These instructions are usually given on a document issued by the Bank which is called a cheque. A cheque is a negotiable instrument, which means that it may be negotiated or transferred from one person to another, in a manner to be described in this chapter. It bears a twopenny stamp, as this is the Revenue duty payable on all orders which require Banks to pay money on demand.

The conditions upon which the Bank will accept your account are matters of agreement between the Bank and yourself, but there are some implied conditions which are in accordance with the practice or custom of Banks. One of these is that the Bank will treat your affairs as private and confidential, and another is that when you draw a cheque the Bank will honour it, if you have sufficient funds standing to your credit to meet the cheque.

When you have insufficient funds in the Bank to meet a cheque, the Bank is entitled to return it unpaid, and when it does so, it may mark the cheque in various ways. It may be marked 'Insufficient funds' or 'Refer to Drawer', or, more simply, 'R.D.' Sometimes it may be marked 'R.D. Effects uncleared'. This might occur, for example, if John Doe pays in a £12 cheque for the credit of his account, and at the time of such payment his credit balance is only £2. On the following day a £10 cheque, drawn by John Doe and

payable to the order of Richard Roe, is presented to John Doe's Bank for payment. As the £12 cheque has not yet been 'cleared', John Doe's account has insufficient funds to its credit with which to pay the £10 cheque. By the time the cheque is re-presented, a day or so later, the Bank will know the fate of the £12 cheque. If it has been paid, and no other funds have been drawn from John Doe's account, the £10 cheque will be paid when it is presented a second time. If, on the other hand, the £12 cheque has been dishonoured and no further funds have arrived for the credit of John Doe's account, the £10 cheque may be returned to Richard Roe marked 'R.D.' for the second time.

Sometimes a cheque may be returned by a Bank marked 'Orders not to pay'. This means that the drawer has given instructions to his Bank that it is not to be paid. A customer gives such instructions to his Bank at his peril. A cheque not paid on presentation is a dishonoured cheque, irrespective of the circumstances of dishonour. If a man has once signed a cheque he may be liable for payment of the amount for which it has been drawn, and it will not necessarily relieve him of liability if he stops payment of the cheque, unless the cheque or his signature was obtained by fraud. Even in such circumstances he may still be liable, if the cheque has come into the hands of a third party who has given value for it without any knowledge of the fraud.

If your Bank wrongfully fails to pay a cheque which you have drawn, although you have funds in your account to meet it, you may have a claim for damages for breach of contract. You will remember, however, that you may normally only recover damages for breach of contract if you have suffered actual pecuniary loss. On the other hand, if you are in business, and your cheque is wrongfully returned to one of your customers or suppliers marked 'R.D.', it may be damaging to your credit, and in that event you may have a claim for damages for libel. In an action for libel—a subject dealt with in Chapter 15—it is not always essential to prove pecuniary loss, but as a general rule no action for libel is likely to succeed in respect of a dishonoured cheque

drawn to pay a private debt, as distinct from a business debt.

Cheques may be either 'crossed' or 'open'. A crossed cheque is one with two lines across its face, and the significance of the crossing is that it must be passed through a banking account. An open cheque may always be cashed at the branch of the Bank of the customer who has drawn it, but if you receive a crossed cheque you cannot cash it. If you have no banking account or Post Office savings account, you must take it to a friend or acquaintance who has a banking account, and after you have 'endorsed' it in the manner described below, he may pay it into the credit of his own account, and give you the cash for it.

When a cheque is paid into an account, it will be superimposed by a crossing stamp with the name of the collecting Bank, and this enables the Bank to be identified at any future date. The words '& Co.' may also be written between the lines of a crossed cheque. This practice dates back to the period when a Banking Company was accustomed to trade with the words '& Co.' as part of its title. Some Banks, such as 'Hoare & Co.', the oldest English Bank, still retain this phrase.

There are many advantages in crossing a cheque. For example, if it is stolen, the thief is not able to cash it across the counter, as he may do with an open cheque. It must, as stated, always be passed through a banking account, and this facilitates detection.

When John Doe draws a cheque payable to 'bearer' it requires no 'endorsement'. If it is payable to Richard Roe, it must be signed or endorsed on the back by Richard Roe or his authorised agent. An endorsed signature must correspond exactly with the name on the face of the cheque. If Mr. Doe receives a cheque drawn to his order, but with his name incorrectly spelt as 'John Dough' he must endorse it 'John Dough' and add his correct signature. If the cheque is made payable to Mrs. John Doe she must endorse it 'Joan Doe wife of John Doe'. The person in whose favour the cheque is drawn is called the 'payee'.

Cheques which are payable to bearer and cheques which have been properly endorsed are known as bearer instruments. This means that they may be negotiated and cashed by anyone who holds them, in the same way as a bank note. If a bearer cheque has been stolen, no subsequent holder is required to repay the amount of the cheque to the true owner, provided he has given value for the cheque in good faith and without knowledge of the theft.

There are, however, a number of ways in which either a drawer or a payee of a cheque may protect himself against loss by theft. It is done by means of what is known as a 'Special crossing'. If you make a cheque payable to the order of John Doe and write the words 'Account payee only' in the crossing, a thief would not be able to cash it, for no Bank would accept it other than for the credit of John Doe's account. If you write the words 'Not negotiable', it means that no person can have a better title to the cheque than that of the person from whom he has taken it. If a cheque is marked 'Not negotiable' it is even safe to leave it lying about, although this is not a desirable practice.

Even without this special crossing, however, an order cheque which has been stolen before endorsement is usually of no value in the hands of the thief. It cannot be negotiated until it has been properly endorsed, and it cannot be properly endorsed, as the payee or his authorised agent are the only persons who may make a proper endorsement. If the thief forges the endorsement, the cheque becomes a nullity, and if the holder of a forged cheque is able to cash it before the forgery is discovered, he may be sued by the true owner for damages for conversion, as defined in Chapter 6. The damage suffered in such a case is usually the amount of the stolen cheque.

It is, of course, impossible for bankers to know if a particular cheque has been stolen, or if it bears a forged endorsement, when it is presented for payment. The Bills of Exchange Act 1882 and other Acts have accordingly given bankers a limited protection against claims for damages for conversion. To enable a Bank to claim the benefit of the

protection, it must have cashed the cheque in good faith and without negligence, and it must have been cashed for one of its customers, and not for a stranger. When a claim arises, good faith is generally assumed, but the claimant usually relies upon negligence. Negligence in this connection has been defined as an omission to exercise due care in the interests of the true owner. For example, the Bank must see that all endorsements are apparently correct. It must not accept for a private account a cheque which indicates that the holder is in possession of it as an agent, or in an official capacity, or as an employee of a firm or limited company, or for partnership purposes. Moreover, a Bank is not usually entitled to accept a cheque for the credit of John Doe's account if the cheque is drawn to the order of his employer, Richard Roe, or if John Doe is a director or employee of Richard Roe & Co., Ltd., and the cheque has been drawn to the order of that Company. To enable a Bank to claim 'protection, it is also essential that it has had no personal interest in the transaction. It must have acted strictly as a conduit pipe or agent for its customer. It loses the protection of the law if it receives and applies the cheque for the purpose of reducing any overdraft due from its customer.

A Bank receives no protection from the law if it pays a customer's cheque when his signature has been forged. A Bank is presumed to know the signature of its own customer, and however clever the forgery, the Bank will not usually be able to escape from its obligation to repay its customer any money paid out on a forged cheque. Exceptions may arise if the customer has actively assisted in the forgery, or has, by his own acts, hindered or prevented the Bank from recovering payment from the forger, or, in certain circumstances, if the customer has been guilty of such gross negligence as to justify a contention that he has made a substantial contribution towards the fraud.

A Bank may also have to re-imburse its customer for his loss if an alteration has been fraudulently made which increases the amount for which the cheque was originally

drawn. If John Doe draws a cheque for 'Four pounds' and this is altered by fraud to 'Fourteen pounds', his Bank may be required to refund the difference if it pays out £14 to the holder of the cheque, even although John Doe has drawn the cheque carelessly by leaving a gap after the 'four' and has in this way facilitated the fraud. The Banker's duty is to honour its customer's mandate. If the customer has only authorised the Bank to pay £4, the Bank is not entitled to debit him with £14.

When John Doe receives a cheque payable to his order, he may send it to Richard Roe with the endorsement 'Pay Richard Roe. John Doe'. When Richard Roe receives the cheque, he must endorse it before it can be further negotiated. He may in his turn endorse it to a third named payee, if he so desires. There is no limit to the number of endorsements which may be made on a cheque. Every endorser, however, makes himself liable to the ultimate holder for the amount of the cheque, if it is dishonoured on presentation, unless at the time of endorsement he disclaims liability by the addition of the words 'sans recours' (without recourse) to his signature. When the holder of a dishonoured cheque wishes to enforce his legal rights against the endorsers, he must notify every endorser without delay of the dishonour. If an endorser has paid the amount of the cheque to the holder after it has been dishonoured, he may claim repayment of such amount from all prior endorsers, or, of course, against the drawer of the cheque.

The account which a customer normally keeps with his Bank is called a current account, and the money is 'on call'—*i.e.*, payment may be demanded at any time. He may also keep a deposit account. When money is on deposit, the account-holder cannot require repayment on demand, or draw cheques on the account. It is usual for a Bank to require fourteen days' notice before repaying money on deposit. Interest—at present the rate is only $\frac{1}{2}\%$ —is usually allowed on deposit accounts.

If a customer wishes to borrow money from his Bank, he should make an agreement either for an overdraft or for a

loan, and the Bank may require security, either in the form of stocks and shares, title-deeds to property, a guarantee from an approved third party, or a life policy.

The interest which a customer receives on his deposit account is less than that which he will have to pay on a loan or overdraft, because a Bank is in business for the purpose of making a profit, whilst the customer deals with the Bank for his own convenience. Not only is it part of the business of a Bank to lend money, but it has to meet the expense of operating its customers' accounts, and also overhead charges and the costs of the services which it renders gratuitously to its customers. It must also keep large funds in hand with which to meet day-to-day demands.

The Bills of Exchange Act 1882 defines a cheque as being 'a bill of exchange drawn on a banker'. A bill of exchange is therefore closely allied to a cheque, and the same Act defines a bill of exchange as 'an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money, to or to the order of a specified person or to bearer'.

The following example will help to clarify this legal definition. John Doe owes Richard Roe a sum of £100. John Doe has no ready cash, but he has a sum of £100 owing to him by Robert Brown, who has agreed to pay him the debt in three months time. He explains this to Richard Roe, and Richard Roe agrees to wait for three months for his money, if he is given a bill of exchange by way of security. John Doe may then purchase a 'bill' bearing an 'ad valorem' Government stamp from the nearest post office. 'Ad valorem' means according to value, and, in the case of a bill of exchange, the stamp is at the rate of 1s. for every £100 for which the bill is to be drawn. On this bill John Doe will give Robert Brown an unconditional instruction in writing, requiring him to pay the sum of £100 to the order of Richard Roe three months after date. He will do this by writing 'Three months after date pay to the order of Richard

Roe the sum of £100'. He will then address it to Robert Brown in the bottom left-hand corner. When he has dated and signed the bill, and has handed it to Richard Roe, Richard Roe has something which is similar to a cheque, except that it is addressed to Robert Brown instead of being addressed to a Bank. The first thing which Richard Roe will want to know is whether or not Robert Brown is prepared to honour the mandate. He therefore takes the bill to Robert Brown and asks him to 'accept' it. If Robert Brown is willing to do so, he will write across the face of the bill 'Accepted payable. Robert Brown'. He may also add the place, usually a Bank, at which it will be paid. If he declines to accept it, the paper is of no value, except as evidence of an admission of the debt owing by John Doe.

After it has been accepted, Richard Roe has a valid bill of exchange. When it is endorsed by him it is a negotiable instrument and may be negotiated in the same way as a cheque, whilst the rights of the parties are, generally speaking, analogous to the rights of the parties to a cheque. A bill of exchange may also be 'discounted'. This means that the holder will take it to his Bank, or to a money-broker, who will pay him in cash the amount of the bill less an agreed sum to represent interest which will accrue before the bill reaches 'maturity'—*i.e.*, becomes payable by the acceptor. If the bill is subsequently dishonoured, recourse may, of course, always be had to the holder who has discounted it, for he will be required to endorse it before it is discounted.

When the bill reaches maturity, three days, called the 'days of grace', are allowed to the acceptor for payment, and the bill must be presented for payment on the last of the three days of grace or on the next available day, if the third day is a Sunday or a Bank Holiday. If the bill is accepted payable at a Bank, or other specified place, it must be presented at that place. If it is not paid on presentation, it is said to be dishonoured. All parties liable on the bill must then be forthwith notified, for, as in the case of a cheque, the holder will lose his rights against any party not so notified, other than the acceptor who always remains liable. If the bill is a foreign

bill—*i.e.*, if it has not been drawn in this country—and if it is dishonoured, it must be 'noted' for 'protest' within 24 hours, and must then be 'protested' before a Notary Public. 'Noting' and 'protesting' are legal formalities recording the dishonour of a bill. A Notary Public is an ecclesiastical official nominated by the Archbishop of Canterbury, and one of his functions is to attest his signature to acts and contracts which have to be evidenced in solemn form. He confers the necessary authenticity on such documents by attaching his seal of office—a procedure called a notarial act—and the noting and protesting of foreign bills of exchange is a matter falling within his province.

A promissory note is another document allied in character to cheques and bills of exchange. It is defined in law as 'an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person or to bearer'. If John Doe owes Richard Roe £100, and agrees to pay him in three months' time, he may agree to give him a promissory note to secure the payment. In that event, he will sign a note stamped in the same way as a bill of exchange, on which he has written 'Three months after date I promise to pay to the order of Richard Roe the sum of £100'. When Richard Roe has endorsed the note, it becomes a negotiable instrument, and, in general, is subject to the same legal incidents as a bill of exchange or a cheque.

A promissory note is not to be confused with an I.O.U. No particular legal significance attaches to an I.O.U., and none of the rules applicable to a negotiable instrument apply to an I.O.U., nor does it require a stamp. Generally speaking, an I.O.U. is merely a convenient form in which a man who lends money to another obtains an acknowledgment of the debt. The holder of a dishonoured bill of exchange, cheque, or promissory note may commence legal proceedings based on the dishonoured instrument, and, generally speaking, there are very few defences to such an action, short of fraud. No similar action may, however, be brought on an I.O.U. The

writ must be issued for the repayment of money lent, and the I.O.U. is only useful as evidence of the debt, if it is disputed.

Criticism of the banking system of this country is frequently due to ignorance of the function of Banks. Until December 1945 there was no real Government Bank, other than the Post Office Savings Bank, and its functions are of a different character from the other Banks. The Post Office Savings Bank is different because it does not carry on trading operations. It does not lend money, but only receives it, and it pays $2\frac{1}{2}\%$ interest on money which is deposited with it. As its name implies, it is essentially a Savings Bank, and the Government has never made use of it for its financial operations, but has always carried those out through the Bank of England. It was argued for nationalisation of the Bank of England that the control of Government finance ought to be in the hands of the Government, and not in the hands of a private institution. It was also said that the Government ought not to permit a private Bank to make a profit out of Government business at the expense of the community, and the Bank of England has accordingly now been nationalised. Under our present economic system it is not clear what advantage the community would receive if control of the other Banks were also in the hands of the Government. They deal in money, which is the recognised token of exchange for buying and selling, and their customers are John Doe and Richard Roe and all the other members of the community. No political party claims the right to dictate how we are individually to use our money. There is no reason why the Government should lend me £500 if I wish to embark upon a speculative venture, and even if I have a sound business proposition, there is no particular reason why I should be financed by the Government—*i.e.*, the community. This is a risk which should be undertaken by a trading concern. It is a business risk which it is the function of a Bank to undertake. Every operation of lending money involves risk, and every Bank loses substantial sums in respect of irrecoverable loans or bad debts every year. A Bank, like every other competently run business, is prepared to take reasonable

business risks, but unprejudiced consideration of the matter ought to convince you that if Banks were to 'go haywire' in granting loans, their stability would be at once undermined. A large proportion of the community have banking accounts, and the Bank's customers would not be pleased if they were informed that rash and hazardous speculation by the Bank had resulted in the loss of their money, for the first duty of every Bank is to safeguard its customers' accounts. There is no reason why *your* money deposited at the Bank should help to finance John Doe when he wishes to set up a speculative business. Rash and hazardous advances for speculative purposes would be equally indefensible if all the Banks were nationalised, and such loans were made by nationalised Banks.

MONEY-LENDERS

'But are they all horrid, are you sure they are all horrid?'

Northanger Abbey

A MONEY-LENDER is the name usually applied to a man who trades in money. It is the legal definition given to a person whose business is that of money-lending. It does not, however, include bona-fide Banks or insurance companies, registered friendly loan or building societies, or pawnbrokers in respect of pawnbroking business. It also excludes every person who carries on a genuine business not having for its primary object the lending of money, even although money-lending may be incidental to the business.

The law has made an attempt to protect the improvident and the inexperienced, but even so, most people will think that an Act of Parliament which recognises a primary right to lend money at a rate of interest not exceeding 48% per annum is being unduly generous to the money-lender, and is unsocial.

As usual, however, we ought to examine the matter from every angle before we pass judgment. For example, it is obviously fair and proper to consider the point of view of the money-lender. As a member of the community, he is entitled to express his opinions, even if we do not like them. He may contend that prejudice is unfair to him, since the community carries on its business under an economic system which permits the right of exploitation of one individual by another and, indeed, sees nothing unjust or improper in such exploitation. In order to be effective, as well as respected, the law must conform to the state of society in which we live. It would be unrealistic to harness it to social conditions which do not exist, and even at present, the money-lender will argue that the law is putting him into a strait jacket. Most of us grumble daily at the restrictions which hamper our business activities. Money-

lenders may frequently contend that our burdens are but shadows compared with the mass of rules and regulations which must be observed in regard to every shilling they advance.

A money-lender will not, as a rule, claim to be a benefactor of society. He caters for the weak and the improvident, and in many cases the borrower is not a model member of the community. There is also less sentiment on the part of both borrower and lender in a money-lending transaction than there is in other classes of trade or business. When a borrower applies for a loan, there is a reasonable probability that he is either one 'who is generally spoken of as having nothing a-year, paid quarterly', or else he will be in fairly desperate straits. Few men of judgment or understanding would ever borrow money from a money-lender, if there was any other method of 'raising the wind'. Therefore Shylock is entitled to claim that when he lends money, he is running a grave risk of losing it. He contends there is only one way by which he can protect himself and recoup his losses on bad debts, and that is by charging a high rate of interest. When he does this he may gain on the swings what he loses on the roundabouts. In other words, he is compelled to make the 'honest' borrower pay for the bad debt of the 'unscrupulous' borrower. This may be bad ethics, but from his point of view it is prudent business.

When a money-lender asserts that he is hedged in by restrictions he is making a justified claim. He is not entitled to avail himself of the comparatively easy methods open to other litigants who seek to enforce payment of trade debts. Not only does the law require to be satisfied that the money-lender has placed his own house in order, even if the debtor does not defend the proceedings, but it offers a defendant numerous defences of a highly technical character, which may in any particular case be without real merit.

The sheet anchor of the borrower is the Moneylenders Act 1927. It codifies earlier laws, and adds a number of fresh restrictions to the burdens of the money-lender. It does much to make avarice a difficult business, for when the

money-lender takes proceedings to recover payment of a debt, any one of the following pleas may be open to a borrower by way of defence, and any single plea, if successfully established, may defeat or modify the claim.

(1) The borrower may plead that the transaction is 'harsh and unconscionable'. This is an old and favourite plea. The right of reopening an 'unconscionable' bargain has been a long-standing privilege, even before any Act of Parliament gave it statutory sanction. The necessity of now proving interest to be both 'harsh' and 'unconscionable', a requirement carried forward from the Moneylenders Act 1900, may, *prima facie*, appear to have widened the money-lender's powers of charging excessive interest. In practice this is not the case, for, as a general rule, the phrase is construed liberally in favour of the borrower. This does not mean that the Court is sentimental about the business. Indeed, a sense of justice may sometimes unconsciously compel a Judge to stretch the law in favour of unpopular members of the community, lest it be thought that he is prejudiced in his judgment, for the Courts are equally solicitous for all classes of society.

When the Court has to decide if a particular transaction is harsh and unconscionable, it has to consider not only the risk taken by the lender, but all the circumstances which surrounded the loan. In this connection, the provision in the Act that interest up to 48% per annum is not, *prima facie*, excessive, is important. It is only when interest exceeds 48% per annum that any onus is placed on the money-lender of proving that the interest charged is not excessive. In other words, in every case in which the interest falls short of 48%, the onus is placed upon the borrower to prove it excessive. This does not mean that interest may automatically be charged at such a high rate as 48%. Every case will be considered on its merits, and when adequate security has been accepted by the money-lender, such a rate would frequently be regarded as excessive.

Some of the relevant considerations which the Court might be asked to consider by either party, when a transaction is

impeached on this ground, are the age and business experience of the borrower, his social status, the degree of his financial embarrassment, the extent to which he has had previous dealings with money-lenders, the result of such previous dealings, the purpose for which the money was required within the money-lender's knowledge, the probability of the debt being irrecoverable, and the value of any security taken. Particular cases might suggest other considerations. An extreme example might be provided by a borrower seeking relief from an interest charge of 48%, when he satisfies the Court that he required the loan in order to pay his current income tax, and had so informed the money-lender. There is no report of such a case on the records, but if asked to adjudicate in such a quixotic example, the Court might consider the money-lender's risk to be minimal, and not such as to justify a high rate of interest.

Even although the debt has, in fact, been paid, and the transaction has been closed, the Court has power to reopen any money-lending transaction on the ground that it is harsh and unconscionable. A loan brought about by fraud may also always be set aside, and can be dealt with on the same basis as any other contract. For instance, a money-lender might arrange a loan at 15%, but might inform the borrower when he came to complete the transaction that he would have to charge 20%, because of a rise that morning in the Bank Rate. If this statement was untrue the transaction would be fraudulent, and the borrower might be relieved from any obligation to repay the loan.

(2) The borrower may prove that the money-lender was unlicensed at the time when the loan was made. Every money-lender must take out an annual licence under the Act of 1927. Unless he does so he cannot recover payment of money lent.

(3) The borrower may prove that the licence held by the money-lender has not been taken out in his true name. The Act of 1927 does not allow a licence to be taken in an assumed name.

(4) The borrower may prove that the loan was granted at

an address other than the registered business address of the money-lender, which has to be specified in the licence.

(5) The borrower may prove that the money-lender did not hold a certificate, which the Act of 1927 requires him to obtain in addition to his licence. The issue of the licence is automatic, if the money-lender supplies the appropriate authority with required information and pays the requisite fees. The issue of the certificate, on the other hand, is a matter of discretion. It is issued by a local magistrate, and may be refused on a number of grounds—*e.g.*, if the money-lender has been guilty of disreputable trading practices. It may also be suspended by the Court at any time, and suspension or forfeiture of a certificate is automatically followed by suspension of the licence.

(6) The borrower may prove that the money-lender has not registered in accordance with the requirements of the Registration of Business Names Act, referred to in Chapter 7.

(7) The borrower may prove that he was induced to obtain the loan as a result of an advertisement sent through the post or by a traveller or canvasser of the money-lender. Travellers, canvassers and postal advertising are all forbidden by the Act of 1927, and any loan made as a result of infringement of any of these provisions may bar the money-lender from recovery of his debt.

(8) The borrower may prove that the money-lender failed to supply him at the time when the loan was made with a written statement, specifying the true rate of interest which was being charged for the loan, or that a copy of this statement was not sent to him or signed by him before the money actually passed. The Act of 1927 requires the observance of all these formalities, and the rate of interest must be correctly stated in the document, unless the money-lender has adopted the scale of calculations appended to the Act. In that event the statement must specify this fact.

(9) The borrower may prove that the memorandum which the money-lender must give him with details of the transaction does not disclose all the terms of the bargain. For example, the loan may be made in part to satisfy an old debt; the

bargain may include an obligation by the borrower to give post-dated cheques; there may be a collateral guarantee which contains clauses imposing additional obligations on the debtor; a bill of sale (see Chapter 21) which contains a power of seizure and sale may have been given as security for the loan, but a copy of this bill of sale may not have been supplied to the borrower, or may not have been annexed to the memorandum which refers to it; the security may be described as a 'promissory note' when in fact there were two promissory notes.

Each of these circumstances is a term of the bargain which must be fully disclosed in the memorandum. In each instance referred to a borrower has been successful in defeating a claim brought by the money-lender as a result of his omission to set out the necessary facts in the memorandum, or to set them out correctly.

(10) Compound interest is prohibited and if the borrower proves that it has been charged the amount will be deducted from the claim.

(11) The borrower may prove that the money-lender has failed to supply him with particulars of the loan and interest charged, after a tender of a sum of 1s. has been made for the purpose. This is a further obligation imposed upon the money-lender by the Act of 1927.

(12) Finally, the borrower may prove that the money-lender has failed to commence his action within twelve months of the last instalment of the loan becoming due, and that there has been no written acknowledgment of the debt within that period. In that event the claim is barred.

Usury is the taking of iniquitous or illegal interest on a loan. Since the law sanctions 48% interest on a loan, a money-lender is not a usurer. Accordingly, there is technically no justification for abusing money-lenders. On the other hand, the situation is anomalous and in many respects disturbing. If I want to borrow a piano for a couple of years, it would be fantastic if I had to pay the lender back with two pianos at the end of that time in order to discharge my obligation to him. If interest in excess of, say, 10% was

an address other than the registered business address of the money-lender, which has to be specified in the licence.

(5) The borrower may prove that the money-lender did not hold a certificate, which the Act of 1927 requires him to obtain in addition to his licence. The issue of the licence is automatic, if the money-lender supplies the appropriate authority with required information and pays the requisite fees. The issue of the certificate, on the other hand, is a matter of discretion. It is issued by a local magistrate, and may be refused on a number of grounds—*e.g.*, if the money-lender has been guilty of disreputable trading practices. It may also be suspended by the Court at any time, and suspension or forfeiture of a certificate is automatically followed by suspension of the licence.

(6) The borrower may prove that the money-lender has not registered in accordance with the requirements of the Registration of Business Names Act, referred to in Chapter 7.

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(8) The borrower may prove that the money-lender failed to supply him at the time when the loan was made with a written statement, specifying the true rate of interest which was being charged for the loan, or that a copy of this statement was not sent to him or signed by him before the money actually passed. The Act of 1927 requires the observance of all these formalities, and the rate of interest must be correctly stated in the document, unless the money-lender has adopted the scale of calculations appended to the Act. In that event the statement must specify this fact.

(9) The borrower may prove that the memorandum which the money-lender must give him with details of the transaction does not disclose all the terms of the bargain. For example, the loan may be made in part to satisfy an old debt; the

bargain may include an obligation by the borrower to give post-dated cheques; there may be a collateral guarantee which contains clauses imposing additional obligations on the debtor; a bill of sale (see Chapter 21) which contains a power of seizure and sale may have been given as security for the loan, but a copy of this bill of sale may not have been supplied to the borrower, or may not have been annexed to the memorandum which refers to it; the security may be described as a 'promissory note' when in fact there were two promissory notes.

Each of these circumstances is a term of the bargain which must be fully disclosed in the memorandum. In each instance referred to a borrower has been successful in defeating a claim brought by the money-lender as a result of his omission to set out the necessary facts in the memorandum, or to set them out correctly.

(10) Compound interest is prohibited and if the borrower proves that it has been charged the amount will be deducted from the claim.

(11) The borrower may prove that the money-lender has failed to supply him with particulars of the loan and interest charged, after a tender of a sum of 1s. has been made for the purpose. This is a further obligation imposed upon the money-lender by the Act of 1927.

(12) Finally, the borrower may prove that the money-lender has failed to commence his action within twelve months of the last instalment of the loan becoming due, and that there has been no written acknowledgment of the debt within that period. In that event the claim is barred.

Usury is the taking of iniquitous or illegal interest on a loan. Since the law sanctions 48% interest on a loan, a money-lender is not a usurer. Accordingly, there is technically no justification for abusing money-lenders. On the other hand, the situation is anomalous and in many respects disturbing. If I want to borrow a piano for a couple of years, it would be fantastic if I had to pay the lender back with two pianos at the end of that time in order to discharge my obligation to him. If interest in excess of, say, 10% was

forbidden by law, money-lenders might be worse off, and borrowers in desperate straits would certainly be unable to borrow money. They would perhaps be made bankrupt, instead of being able to continue to prey on the community by 'earning' money by methods which must at times be of a highly suspicious character. Would legislation which restricts interest be beneficial to the community as a whole? We will leave the question unanswered, and you can deliver your own judgment, after you have impartially weighed all the arguments which might be advanced on either side.

GAMING AND WAGERING

'Queen Elizabeth . . . had allways about Christmas evens set dice; that threw sixes or five and she knew not they were other, to make her wise and estcame herself fortunate.'

William Drummond

THE law with regard to gaming and wagering is obscure. In a recent case, a jury was asked to decide whether or not the game of poker was a lawful or an unlawful game—and the question was not finally decided. There is no definition of a lawful game, but an unlawful game is any game in which the element of skill, as distinct from chance or hazard, is virtually absent. In the case in question the only decision reached by the jury was that the game of poker as played on the occasion which led to the proceedings was unlawful, but the decision is not a precedent, as the illegality of any game is a question of fact which can only be decided on the facts of each particular case. The decision on this particular occasion means that the jury thought the game was devoid of that particle of skill required to remove it from the realm of illegality into the sphere of legality. The decision does not bar any other person charged with an offence which turns upon the legality of the game of poker from requiring investigation of the facts, and taking a gamble that a different jury would arrive at a different decision.

'Gaming', 'wagering', 'betting', and 'lottery' are the four key words which cause the mischief. These are the Big Four among the lesser sins of the community. What do they each mean?

'Gaming' is the staking of money or money's worth on the result of a game of chance in which there is no appreciable element of skill. 'Wagering' is the term used when money is risked on a contingency in which the wagerer has no active interest, beyond the loss or recovery of his money. 'Betting' is an off-shoot of wagering, and is the expression usually, but

not invariably, employed in respect of wagers on sports or games. 'Lottery' is a distribution of prizes by lot or chance, and nothing but chance. If real merit or skill plays any part in determining the distribution, there is no lottery.

The year 1388 marks the first legislation passed with the object of suppressing these 'vices'. Labourers were then enjoined, for the purpose of perfecting their military skill, to use bows and arrows on Sundays, and not to play football, quoits, dice, and 'other such importune games'. Over 150 years later, 'bowyers strigers fletchers and arrowhead makers of the realm' persuaded Parliament to pass an Act, which has never been completely repealed, to meet the dangers created by 'divers and many subtil inventive and crafty persons' who had found 'many and sundry new and crafty games and plays as logating in the fields, slide-thrift' (apparently a form of shove-halfpenny) whereof 'archery is sore decayed' and 'divers bowyers and fletchers for lack of work had emigrated to Scotland, where they were working and teaching their science to the great comfort of strangers and detriment of this realm'. Penalties were imposed on all persons keeping houses for unlawful games and all persons resorting thereto. Dicing and cards were the principal 'unlawful games' aimed at, but it was further provided that 'no manner of artificer or craftsman of any handicraft or occupation, husbandman, apprentice, labourer, servant at husbandry, journeyman or servant of artificer, mariner, fisherman, waterman or any serving man' should play 'tennis, dice, cards, bowls, coits clash, or logating . . . out of Xmas'. They were, however, permitted to play these games during Christmas time, provided they did not do so in their master's houses or in his presence. It will be observed that games of skill were included as well as games of chance, and an offence was committed even though the games were not played for money.

The motive prompting this legislation appears to have been the desire to divert the attention of the working man from frivolous pursuits, in order that he might fulfil his military obligations and Sabbath duties. Many statutes passed during the last 500 years have further sought to check these

'sins and iniquities'. They have, among other things, declared, firstly, that certain games and lotteries are unlawful; secondly, that it is an offence to keep an establishment for betting, gaming and lotteries; thirdly, that it is an offence to bet or gamble in streets and public places, and fourthly, that certain claims arising out of betting and wagering are not to be recoverable in Courts of Justice. Offences under the first three of these headings are within the realm of crime. It is to be observed that betting, in itself, is not an offence. There is nothing illegal in receiving or paying a lost bet. 'The law refuses to assist either party in their folly', remarked one Judge, 'but it is quite another thing to forbid the loser to keep his word.' A bet is, however, a criminal offence if the *manner* and *place* in which it is made are contrary to statute, as explained later in this chapter.

As a result, 'sportsmen' are for ever sparring with the law to avoid being smothered by the blankets laid down for their protection.

Here are some of the operations which free Englishmen are not permitted to perform by virtue of this restrictive legislation.

(1) The Gaming Act 1845 makes it an offence to keep a common gaming house. To prove a house to be a common gaming house it 'shall be sufficient to show that it is kept or used for playing therein at any unlawful game, and that a Bank is kept there by one or more of the players exclusively of the others or that the chances of any game played therein are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed or against whom the other players stake play or bet'. Criminal prosecutions may be brought under this section against persons who organise card parties, and from time to time respectable London Clubs, frequented alike by Lords and Commoners, are raided as a prelude to a prosecution. Premises at which a Bridge Club is conducted are not regarded as a common gaming house, as bridge is considered to be a game which requires skill, and is accordingly not an unlawful game.

(2) By the Betting Act 1853 it is illegal to keep a house, office, room, or other place for the purpose of any person betting with persons resorting thereto, or for receiving deposits in consideration of bets on contingencies relating to horse races, or other races, fights, games, sports or exercises.

This Act has given rise to much legal subtlety. The word 'place' is not defined, but it has been held to include a public-house, a bar, an archway, a small plot of waste ground, a bookmaker's stand, and even the space beneath an umbrella which a bookmaker had opened to attract customers. It has also been held to include club premises, when special telephone lines were installed to connect the club with a bookmaker to facilitate betting by members, and even although no bets were ever taken on the club premises.

(3) By the Betting and Loans (Infants) Act 1892 it is an offence to send a document to anyone known to be an infant inviting him to enter into a betting or wagering transaction, if it is sent with a view to profit.

(4) The Street Betting Act 1906 makes it an offence for any person to frequent or loiter in a street or public place on behalf of himself or any other person for the purpose of bookmaking or betting or wagering or agreeing to bet or wager or paying or receiving or settling bets. A motor driver who passed and re-passed along a street and slowed down to receive betting slips was held to be a 'frequenter', and accordingly to have committed an offence under this Act. Race-courses and land adjacent to race-courses are, however, expressly excluded from the Act on days when racing takes place.

(5) The Betting and Lotteries Act 1934 makes it unlawful for a newspaper to conduct a competition in which prizes are offered for forecasts of the result of a future event. Pari-mutuel or pool betting, are, however, expressly excluded and they may be legal under certain conditions. The ingenuity of pool promoters has confounded the Judicial Bench, and they are divided on the question of whether football pool advertisements in newspapers are lawful or

unlawful. Some Judges have decided that a football pool advertised in a newspaper is a prize competition, and therefore unlawful, whilst others consider it is not a prize competition, and therefore capable of being legal, so long as the provisions of the Gaming Acts are not infringed. The House of Lords may have to decide this question, and millions of the community will rejoice or grieve over their judgment.

(6) The Betting and Lotteries Act 1934 has also codified the law relating to lotteries. A very wide net is cast to enmesh all those who directly or indirectly take part in the promotion of a lottery. Lotteries which are incidental to bazaars, sales of work, fêtes and other similar entertainments, are not illegal if the whole of the proceeds, subject to minor deductions, are devoted to purposes other than private gain, and there are no money prizes. Other lotteries, known as private lotteries, in which tickets are sold exclusively to members of a Society, such as a club or institute, or which are promoted at a factory, or other works or residential premises, where all the participators work or reside on the same premises, are also excluded from the provisions of the Act. They are lawful, provided there is neither advertising of the lottery nor the sale of tickets to anyone outside the group among whom the lottery is being conducted, and if the whole of the proceeds, subject to the deduction of proper expenses, is used for prize money or club purposes.

Those who contemplate the promotion of a charity or private lottery would be well advised to make themselves acquainted with the full provisions of the Act, as infringement of the law subjects the promoters to criminal proceedings, with the prospect of heavy penalties, and even the possibility of imprisonment after the first conviction.

(7) Totalisators have not been overlooked. As they are, from their very nature, calculated to infringe the betting laws, a special statute was passed to permit them to be operated on approved horse race-courses and licensed dog-tracks, for pari-mutuel and pool betting transactions. Betting at the Dogs has also been the subject of legislation, and betting may take

place on licensed dog-tracks, although licences are only issued under stringent conditions.

The betting laws are particularly criticised for permitting credit betting, thereby making an unfair discrimination in favour of the wealthier members of the community. It is right to observe, however, that a legal authority to bet is not necessarily a boon. In an ordered community, a licence to gamble is a doubtful asset, and there is no difference in principle between the get-rich-quick Stock Exchange speculator, and the 'punter' who hopes for unearned increment every time he puts a shilling on a horse. Gambling has brought ruin to many, and will bring ruin to many more. When the present law is criticised, it is fair to remember that restrictions on betting and gambling help to make indulgence more difficult, and the community may benefit, since we are not all inoculated against gambling fever. Whilst, however, the removal of restrictions would have unfortunate results, further limitations on credit betting would undoubtedly be the signal for universal lamentations from rich and poor. Even if the present situation pleases no one, it may still be best fitted to meet the needs of the community, as so often happens when the English exercise their genius for compromise. Moreover, Parliament is at liberty at any time to promote legislation to amend the law in relation to any social activity. It will presumably make amendments to the existing betting laws, if it believes the community as a whole desires a change to be effected, but it is unlikely to do so unless the urge for reform becomes irresistible.

In the administration of the civil law there is no distinction between rich and poor in dealing with claims arising out of betting and wagering. A person who enters into an agreement to give or receive money or money's worth upon the determination or ascertainment of an uncertain event—*i.e.*, a wager—cannot enforce the agreement in a Court of Law. It is a debt of honour, or 'gentleman's agreement'. The Gaming Act 1845 includes a provision that all agreements, whether verbal or in writing, 'by way of gaming or wagering'

shall be null and void and 'no suit shall be brought or maintained in any court of law or equity for recovery of any sum of money or valuable thing alleged to be won upon any wager or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made'. The provision expressly excludes any subscription for prize money to be awarded to the winner of 'any lawful game, sport, pastime or exercise', and there is accordingly nothing to preclude a Court from entertaining a claim for prize money, in a proper case. The Gaming Act 1892 was passed to catch commission agents and to bar their right to recover debts owing to them by their principals, in respect of bets made and paid for them.

Even if a cheque is given in payment of a gaming debt, the drawer may stop payment, and he cannot be sued by the payee, since the consideration is illegal. If the cheque has been passed for value to a third party, the latter can only recover payment if he has taken it in good faith and in ignorance of the illegality which taints the transaction. A third party who has taken a cheque drawn in payment of a betting debt *which does not arise out of gaming* is in a stronger position. In such a case, and by the application of the ordinary rules which govern negotiable instruments dealt with in Chapter 9, he may recover payment, so long as he has given value for the cheque. The holder of the cheque is favoured in this way, because, as already stated, there is nothing illegal in receiving or paying certain types of lost bet.

The business of a bookmaker might under all these restrictions appear to be hazardous. Nevertheless, it is conducted with profit by many bookmakers, and most of them naturally know and keep to the rules of the game. It will, of course, be appreciated that they are only able, in theory, to carry on their business by accepting all bets on credit terms, with the exception of those permitted on days of racing on and adjacent to race-courses, which were referred to above. Any other form of betting is illegal, and would attract the attention of the police in a most undesirable form. Moreover, it must again be emphasised that

even credit bets, if unpaid, cannot be recovered by legal proceedings, and the bookmaker cannot recover payment from his client, if he fails to honour his engagements. At a time when there is so much outcry over the dishonesty prevalent in the community, it is interesting to observe that bookmakers still keep their flags flying.

Whether the community is hypocritical or pharisaical on the subject of betting is a matter of speculation. It is relevant to observe that the bookmaker is under the same obligation as any other trader to pay income tax on the profits of his business, whilst the law does not refuse to intervene in disputes between partners in a bookmaking business.

Although bookmakers may be unable to recover payment of their debts through the machinery of the Courts, they sometimes have other methods. A defaulting debtor may be induced to enter into a new contract in which a new consideration is introduced. There is nothing unlawful in issuing a writ for the recovery of a betting debt, leaving it open to the defendant to plead, by way of defence, that the debt sued for is a betting debt, and therefore irrecoverable under the Gaming Act 1845. Some debtors shun the publicity which the plea may entail. Others are ready to come to terms with a bookmaker, even before the issue of a writ, if it is suggested by the bookmaker that if they do not pay, their default will be reported to Tattersall's. After such a report has been made, no reputable bookmaker will accept a bet from the defaulter, and it may mean the end of a gambler's dream. If an agreement is made by a defaulter, in such circumstances, to pay the amount which is due, he may be sued if he fails to pay. He cannot then plead the Gaming Act by way of defence, for an agreement not to report to Tattersall's is a good consideration for a contract, and there is nothing illegal or unlawful about it.

Wagering includes gambling in stocks and shares, and the law will not enforce a contract to pay monies won or lost in such a case. All transactions carried out through a recognised Stock Exchange are, however, subject to rules and regulations

designed to avoid illegality. Speculation, if carried out according to well-settled rules, is not wagering, although the bargain will be unenforceable, if it is found to be a simple wager on the price of a particular stock at some future date, and if the real interest of the parties is to gamble in the difference between the price at the date of purchase, and the price on the date when the stock would have had to be delivered if the transaction had been bona fide.

At present all Stock Exchange transactions are subject to severe control, which curtails the wilder aspects of speculation, and many reputable stockbrokers have never been willing to undertake disguised gambling for clients.

Recent legislation has restricted the activities of a class of stock and share brokers, known as 'outside brokers'. They are not members of any recognised Stock Exchange, and their activities have usually been a veiled form of gambling. Although they took your money, they frequently refused to pay you when you won your bet. Under the Prevention of Fraud (Investments) Act 1939, every dealer in stocks and shares who is not a member of a recognised Stock Exchange must obtain a licence from the Board of Trade before he is permitted to deal. A sum of £500 must be deposited as a preliminary to the grant of any licence, and the Board has power to refuse or revoke a licence when the applicant fails to furnish satisfactory information about his proposed business, or if he appears to the Board not to be a fit and proper person to hold a licence. The regulations are designed for the protection of the unwary, and to save dupes and gulls from scoundrels.

Thus, although our betting and gaming laws are mysterious, inconsistent, and paradoxical, there stands out the predominant desire of the legislature to be a grandmother to those who have insufficient strength of character to resist the potential evils of gambling. Legislation by grandmothers may be undesirable since 'there is no spectacle so ridiculous as the British public in one of its periodical fits of morality.' On the other hand, let us be honest and admit that some of us run better when we are kept on the straight and narrow path.

FRAUD

'I remember when one whole island was shaken with an earthquake some years ago, there was an impudent mountebank who sold pills which (as he told the country people) were very good against an earthquake.'

Joseph Addison

THE majority of the community are law-abiding and honest, but there is a minority who wilfully break the law or who are deliberately dishonest. Some offend from greed—a desire for wealth and power—others because they have never been trained in the duties of citizenship, and find crime a stimulating adventure, and yet others because they have been barred from participation in the normal life of the community, either through inadaptability or misfortune.

Imprisonment, *i.e.*, loss of personal liberty, or payment of a fine is the punishment prescribed by the law for those who are found guilty of an offence against the rules of the community.

Loss of liberty, however, is no consolation to the individual who has been physically or financially injured by the offence, nor is he usually entitled to any benefit from the fine. If you are assaulted, you are entitled to claim compensation from the aggressor in the civil courts, although, as an exception to the general rule, no civil action will lie against the assailant if criminal proceedings have been taken in respect of the same assault. If you are the victim of a fraud, you are also entitled to compensation, and this chapter outlines the nature of the assistance which the *civil* law can give you on such occasions. Very often, of course, a swindler is impecunious or manages to conceal the proceeds of a fraud. It should be obvious, although the community do not always appreciate the fact, that the law cannot achieve the impossible. If a man has no money, or if he has concealed it with sufficient skill and ingenuity to defeat human efforts to trace it, the law is no more powerful than the individual in effecting its recovery.

There is no precise legal definition of fraud, but it is, in general terms, any deceit or imposture. Many frauds are actionable torts. For example, 'share-pushing', or the unloading of worthless shares on members of the public, by false representation as to their value, is a fraud. Obtaining money by false pretences is a fraud. The sale to an innocent purchaser of property known to the vendor to be stolen is a fraud. Any one of them, irrespective of punishment by the criminal courts, may give rise to an action in the civil courts. You are not entitled to compensation in such circumstances as a matter of course. An allegation of fraud is a serious one, and requires strict proof. An example will illustrate the facts which you must be prepared to prove if you hope to succeed in an action brought to recover damages for fraud.

Let us suppose that you have seen an advertisement in a newspaper advertising a business for sale for £1,000 which is stated to have an average weekly turnover of £100. After some correspondence, and an interview with the advertiser, during the course of which he adds a few 'puffs', to garnish the virtues of the business which he hopes to sell, you foolishly agree to buy the business without seeking any advice, pay out £1,000 and complete the deal.

After a few days you find that the turnover is not £100 a week, or even approximately that amount, but is only about £50 a week. In fact, you realise that you've 'had it'. You then consult a lawyer in order to ascertain your legal position, in the confident belief that the law will rescue you from the bog into which you have innocently, but foolishly, waded. You will be advised that there are five essential ingredients which you must prove to establish your legal right to rescission or cancellation of the contract, or to damages. They are common to all actions for fraud. Each of them requires separate examination.

1. There must have been a representation of fact. The statement in the advertisement that the average turnover was £100 a week was a statement or representation of fact. The first element in the case is thus, in this instance, easily proved.

If, however, the advertiser had not made any exact statement of the takings, but had spoken in vague terms of an 'excellent' or a 'first-class' business, you might have no remedy. These are not statements of fact, but are usually regarded as mere expressions of opinion, or puffs, which do not give rise to a legal claim, for opinions may differ as to when a business is 'excellent' or 'first class'. Again, the advertiser may have concealed an important fact—*e.g.*, that a rival business was to be opened on adjoining premises. Unless words were used which were deliberately deceitful, you would, however, normally have no remedy merely because you were not informed of this. There would have been no representation of fact unless you had actually been informed that you would not have to contend with any opposition, or words had been used which were deliberately intended to give you that impression.

2. You must next prove that the representation or representations of fact were made without any honest belief in their truth. Of course, if the advertiser had left behind him a set of books, purporting to establish the takings as being £100 per week, and you are able to prove that the entries in the books are false, the Court would be satisfied that he did not believe his statement was true when he inserted his advertisement. Suppose, however, he was just a muddler who kept no books of account. It is possible, in such a case, that he might really have thought his turnover was £100 a week. You may find this difficult to believe, perhaps, but there are many muddlers in the world who are capable of believing anything they wish to believe.

3. The third link in the chain is to prove that the defendant intended you to act upon the representation. When an advertisement offering property for sale is published, the intention is apparent, but the facts are not always so simple. If you meet your friend, John Doe, at the 'local', and he gives you alluring details of the profits of his business, he may, or may not, be merely boasting. You, however, may take his remarks seriously, and decide you would like to buy the business—the remote prospect of acquiring it lending

enchantment to your idea of its value. You pluck up courage, and when you meet John Doe a few days later, you ascertain that he is willing to sell, and you enter into negotiations for its purchase which in due course materialise. You may then be in a quandary if you find that the profits suggested by John Doe are illusory, and that the customers are few and far between. If you sue him for damages for fraud, he may plead that he never intended you to act upon his representations, and you will have to admit that no question of sale had arisen at the date of your original discussion. Even if John Doe had, in fact, lured you into the negotiations, he may have been too cunning to disclose his deceit, and you have no shred of evidence to prove it. You will not, therefore, be able to succeed in your claim for damages, since although 'the state of a man's mind is as much a question of fact, as the state of his digestion', suspicion as to the state of his mind normally proves nothing in a Court of Law.

4. You must prove that you have in fact acted upon the representations made to you. The actual purchase of the business is normally the best evidence that can be given to prove this claim. If you had not purchased the business, because you mistrusted the advertiser, and, in fact, had been astute enough to realise that the advertisement was not bona fide, you would have no claim for wasted time. You might, of course, in such circumstances tell your friends, in confidence, that a man like that ought to be prosecuted. You might also think it desirable to report the facts to the police, in order to protect the community from his fraud. Citizens, however, rarely act in this way. They prefer to mind their own business. Moreover, before you make complaints to the police, or suggest to your friends, even in confidence, that some one ought to be prosecuted, you should be very sure of your facts. You may otherwise become involved in an action for slander—a subject dealt with in Chapter 15.

5. You must prove that the representations were, in fact, untrue. This is frequently the most difficult task of all. Suppose, in the example we are considering, that the takings

were only £50 during the first week of your ownership instead of the 'average weekly turnover of £100'. If the advertiser has not left behind any books of account, it will not be easy to prove that the takings did not average £100, in accordance with his representation. He may contend that the customers had patronised the business because he was personally popular; and he may say it is not his fault if they refused to transfer their custom to you after the sale. Alternatively, he may say that you are lazy and don't attend to the business properly, or you are inexperienced and don't understand it. He might even say that you know 'the price of everything and the value of nothing'. If he is very skilful and deceitful, he may also produce a set of books to prove his statements were true. As you purchased the business without any trial period under his ownership, it may be impossible to prove that the entries in the books are false.

However, if you have been able to establish this and the other four points in your favour you may then be able to obtain legal redress.

If you have acted promptly on learning of the fraud, but only if you have acted promptly, the Court may rescind or cancel the contract, and order the defendant to repay the purchase price, and also to pay damages for any loss you have suffered as a result of the fraud. In other cases the Court may order the defendant to pay, as damages, such a sum as will represent the difference between the value of the business, if the facts had been truly stated, and the sum which you paid upon the false representations, together with any expenses which you may have properly incurred. There are some cases of this character when fraud cannot be proved, but the Court is satisfied that there was an innocent, as distinct from a fraudulent, misrepresentation. In these cases the Court may order the contract to be rescinded and the purchase money to be repaid. It will not, however, award damages to reimburse you for the expense which you have incurred in installing yourself in the business.

In any event, you are almost certain to emerge from the affair a wiser but a poorer man, and although we learn every

day that we have to pay for our errors, we may sometimes get value for our money if we record the mistakes in our book of experience.

From the foregoing you will have gathered that if you are considering the purchase of a business from a stranger, you should never buy a 'pig in a poke'. If a 'pig' is offered for sale which appears to be attractive, be sure you seek advice before you agree to buy it. There are many members of the get-rich-quick fraternity who are on the look out for the unwary, and if you have recently inherited money, which you wish to invest in the purchase of a business, it will soon disappear, unless you act with prudence and caution.

Moreover, as a footnote, you should remember that when you purchase a business, it is always advisable to agree with the vendor, as a term of the sale, that he will not open a competing business within a named radius, and within a fixed period. This is known as a 'restrictive covenant', and is almost invariably included in every properly drawn agreement for the sale of a business. The same principles are to be applied in preparing such a covenant as are referred to in Chapter 5, when the question of 'restraint clauses' in agency agreements was considered. It is, however, essential to remember that the Courts will refuse to enforce the provisions of a restrictive covenant if it falls beyond the limits which are reasonably necessary for your protection on the facts of the case.

TRESPASSERS, LICENSEES, AND INVITEES

'Said my mother, "What's all this story about?"

—"A cock and a bull," said Yorick."

Tristram Shandy

WHEN you walk in the country you may observe a notice-board at the entrance to a meadow marked 'Private. Trespassers will be prosecuted. By Order.' What is the legal significance of such a notice?

A 'trespass' used in this sense is an unauthorised entry on land. If you enter the land of Mr. Doe without his authority, express or implied, you are committing the tort of trespass. Hence all squatters are trespassers.

Trespass, formerly regarded as a criminal offence, is not limited to offences relating to land. The term includes a variety of torts committed in respect of land, goods or persons. Trespass to the person may in certain circumstances be prosecuted as an assault, and trespass to goods may also constitute a conversion, a subject dealt with in Chapter 6.

In this chapter trespass is used in the more restricted sense of an unlawful entry on land, and at the present time it only gives rise, generally speaking, to proceedings in a Civil Court. If John Doe finds you in the act of trespassing on his land, and you refuse to leave when you are asked, he may eject you forcibly. He must not, however, use more force than is necessary for the purpose. If you leave the land quietly, he has, for practical purposes, no remedy, unless you have caused damage to his property, or threaten to repeat the offence. You must not, however, feel encouraged to trespass because of the difficulty which the owner has of enforcing a remedy. The exhibition of the notice may be of little importance in itself, but private property is not public property, and it is an offence to trespass on private land, even if no warning notice is exhibited. You should, in any event, always be careful, when you are walking through a field, to shut every gate and to avoid trampling

over growing crops. If you leave a gate open, and cattle stray on to the highway, you may be responsible for any injury which ensues. You may also be liable if you damage growing crops.

Although Mr. Doe has so little remedy for a casual trespass, he may obtain an injunction from the Court to restrain a man who persists in the offence. If the trespasser disregards the terms of the injunction, he may then be committed to prison for contempt of Court, for the Court has no sympathy for any member of the community who flouts its orders.

There are many occasions when you will find a footpath leading across a field. Are you committing a trespass if you walk across this path? The answer depends largely on whether or not there is a right of way to the public to use the path. If the path has been open to the public for a period of twenty years, without any interruption or interference from the owner of the land, it becomes a right of way for all time, unless this right is subsequently lost as a result of the abandonment by the public of the right—*e.g.*, acquiescence by the public in a barrier erected by the owner, which bars access to the right of way.

Mr. Doe, who has recently purchased Greengates, with 20 acres of land, may be annoyed to find a right of way across his land. The right, once established, however, is attached to the land. It may be either a public or a private right of way, but the sale of the land to a fresh owner cannot destroy the right. If it is a public right, *i.e.*, available to the public at large, it is known as a highway. If it is a private right of way, *i.e.*, for the benefit of an adjoining owner, it is what is called in law an 'easement'. An easement is a peculiar legal privilege or right, and a private right of way is only one of several forms which it may take. It is an essential feature of every easement that it gives a stranger, Richard Roe, the owner of property A, a defined privilege *vis-à-vis* John Doe's property B, and allows things to be done which would otherwise amount to a trespass. For example, there may be easements relating to drains, sewers, or passage of water, which will give Richard Roe the right to the use of specified

drains or sewers, or the right to run water across John Doe's land.

When you see a path across a field, you do not, of course, know whether the path has been open to the public for twenty years without interruption. You must not, however, assume that every path across a field is a right of way. It may be that a public-spirited owner allows the public to use the path. He can do so, and at the same time preserve his rights over it as a private path, by closing it for a single day in each year. Any act performed at intervals, and clearly designed to show that the owner is not dedicating the path to the public, is sufficient to bar any subsequent claim by the public to a right of way.

Apart from your legal authority to pass over a public right of way across Greengates, you may have occasion to visit the house on the estate for a particular purpose. Your legal rights and obligations will vary according to the circumstances of your visit in each case, and they will depend on whether you are a trespasser, a 'licensee', or an 'invitee'.

A licensee (not, in this instance, to be confused with 'the Voice within the Tavern') is a man who has express or implied permission to do an act which would otherwise be unlawful. If there is no right of way, and you enter the grounds of Greengates without any legal justification, you are a trespasser, but if you enter them in order to visit the premises for a lawful purpose, or if Mr. Doe invites you to do so, you are either a licensee or an invitee. You must not confuse 'right of way' with 'licence'. A right of way is, as explained, a right which goes with the land. No permission to use it is given to you by Mr. Doe, as he has no say in the matter. A licence, which may be express or implied, is a personal authority, given by an owner, and it can be withdrawn at any time, unless it was given for valuable consideration. If given for valuable consideration it has, generally speaking, the effect of a contract, and your rights will be determined by the conditions under which it was given.

A licence to enter land is not necessarily given by express authority. It may sometimes be implied. For example,

you may enter Greengates to fetch your umbrella, which you had inadvertently left behind on your last visit to the house. You then have a licence to visit Greengates, and you will be a licensee and not a trespasser, because fetching an umbrella, in such circumstances, is a lawful act, and when you are entering the land to fetch it, you are doing so for a lawful purpose. The lawful purpose gives you an implied authority to enter the land, even although you have no express invitation to do so.

There is an important distinction between the legal rights of a trespasser and a licensee. Generally speaking, a trespasser has no legal rights. If he is injured when trespassing, and even although the injury results from some neglect or default on Mr. Doe's part, he has no legal remedy. He has no business to be there, and he is not entitled to complain if Mr. Doe has left a bull in a field, and he takes a toss. Nor has a late night reveller any legal remedy if, straying accidentally from the roadway, he enters through the gates which give access to Mr. Doe's land, and injures himself by falling in a trench dug by Mr. Doe for his sweet peas. He has no lawful business on Mr. Doe's land, and cannot recover compensation for the injury. On the other hand, Mr. Doe is not entitled to set a deliberate trap on the land, in order to catch trespassers as though they were wild beasts. That would be illegal, as it would be taking the law into his own hands, and if a trespasser were injured in such a trap he might be able to claim compensation.

A licensee, however, has a legal status which gives him legal rights. Although he cannot expect Mr. Doe to take special precautions for his security, he is entitled to expect the land to be safe from hidden dangers. If he is lawfully on the land, he might claim compensation if he fell during hours of darkness in a trench. It is what is known in law as a 'concealed trap'—although the word 'trap' in this instance does not necessarily mean any deliberate or even any positive act by the owner of the property, and might include, for example, a concealed step in a dark corridor. The liability of the owner for injuries caused by a concealed

trap is not an absolute one in every instance. If he can satisfy the Court that he did not know, and had no reason to suspect, the existence of the concealed trap, he may be able to avoid liability.

The term 'invitee' to which reference has been made is in some respects a misleading one. If you accept Mr. Doe's invitation to tea, you might reasonably consider that you are an 'invitee'. This is not the case. You are only a licensee. Nevertheless, when the milkman calls at your premises and delivers your milk, he is an invitee. You must therefore rid your mind of the mental association between 'invitation' and 'invitee'. The relationship of invitor and invitee arises when there is a mutual interest or common purpose between the owner or occupier of premises—the invitor—and the individual who enters the premises—the invitee. It is not sufficient for this mutual interest or common purpose to be merely social in character, for, as stated in Chapter 2, it does not give rise to a legal claim for damages when a friend who has accepted an invitation to tea fails to arrive. Accordingly, when you visit Green-gates in order to accept Mr. Doe's invitation to tea, you have not the same legal status as the milkman who has an obligation to deliver the milk. He is, therefore, the invitee, and you are the licensee.

It is not necessary in every case that there should be an express contract in order to create the relationship of invitor and invitee. When a man enters a shop with the intention of making a purchase he is an invitee, because there exists a mutual interest or common purpose between the prospective customer and himself. The customer may not, in fact, make a purchase, but his visit receives legal recognition because both parties are minded to make a contract, if the customer is able to purchase what he requires.

The distinction between licensee and invitee is of importance in considering their respective legal rights. The licensee, as stated, must take the premises as he finds them, provided there is no concealed trap. The invitee, on the other hand, is entitled to protection from 'unusual danger', as distinct

from 'hidden danger' or 'concealed trap' and there is a duty imposed on the owner of property to take reasonable care to prevent injury to an invitee from unusual danger.

If Mr. Doe leaves a bull in a field giving access to Greengates, we have seen that a trespasser has no legal ground to complain if he is injured. If, however, a licensee or an invitee is tossed by a bull and injured, Mr. Doe might be under some liability, the extent of such liability being dependent on the facts in each case.

If, for example, either a licensee or an invitee is visiting Greengates and sees a bull in the field as he approaches the premises, it would be wise for him to consider his step before he goes forward, particularly if the bull has hay on his horn. It is true that the owner has no business to leave a bull in an open field, but a bull, although perhaps an unusual danger, is not necessarily a concealed trap, or a hidden danger, if he is seen to look aggressive from afar. If a bull bars the way, the visitor must accordingly act with prudence. If he decides to take a chance, although he realises the risk of an attack, he may not be able to claim compensation if the bull fulfils his expectations. Even an invitee might be without redress in such a case, for it would not be the presence of the bull which is the proximate or immediate cause of the injury, but his own negligence, in rashly advancing. The problem would be still more involved, and a fit subject for a legal 'moot', if the visitor thought the bull was a cow. In that event a Judge might be called upon to decide whether a man is legally to blame if he is innocent of the distinction between the bovine sexes. Without giving any assurance on the point, it might be argued that an *invitee*, if a townsman, could plead his ignorance, although a *licensee* would not in any circumstances be able to do so successfully.

Consider these two examples, which further illustrate how difficult it may be to decide in a particular case whether or not compensation is likely to be recovered by a licensee or an invitee when he meets with injury.

1. You are visiting your friend Mr. Doe socially, and suffer injury by slipping on a piece of highly polished linoleum. In

the belief that highly polished linoleum is a concealed trap, you make a claim for compensation. Your claim would fail, however, as although highly polished linoleum is an *unusual* danger, the Court has decided that it is not a concealed trap, or a *hidden* danger.

2. You are shopping at Mr. Doe's stores and are once more unfortunate enough to slip on polished linoleum. Again you claim compensation, and this time you may be more successful, for Mr. Doe owes you a duty, as an invitee, to take reasonable care in the management of his premises. Although it is not a concealed trap, Mr. Doe may be ordered to pay compensation, since it has been held to be an unusual danger.

Yet another difficult aspect of this branch of the law arises in the case of injury to children.

Children are legally recognised as being mischievous, and as they are not capable of looking after themselves in the same way as adults, the law is more solicitous for their welfare. Owners of property have, in particular, an added burden of responsibility placed upon them in their legal associations with children. Even if children are trespassing, they may have legal rights, for if Mr. Doe knows that children are in the habit of playing on his land, and he takes no positive act to bar their access, he may be responsible, in certain circumstances, if they injure themselves. For example, children like to play with farm implements, and if Mr. Doe leaves a tractor in a field which he knows is frequented by children, he must take precautions to bar access to the field whilst the tractor is unprotected, even although the children are trespassers. If he does not do so, and a child, Fidget, injures himself by interfering with the mechanism of the tractor, Mr. Doe may be liable to pay compensation for the injury. It may be no defence to plead that Fidget was a trespasser and had been warned not to play round the tractor.

Mr. Doe might, however, be able to escape liability if he did not know, and had no reason to know, that children had ever previously been in the field. His responsibility,

and his duty to remove a potential danger, arise from his knowledge, or assumed knowledge, that children may be playing in the field. He may also have a good defence to a claim if Fidget was accompanied by an adult at the time of the accident. If the child is under supervision, his legal status is no better than that of any other trespasser. Finally, Mr. Doe might also escape liability if he could prove that an unauthorised person had removed an obstruction which had previously barred access to the field. The law will not hold him responsible for the wrongful act of an unauthorised person.

As a finish to a difficult subject, here is another 'teaser'.

Fidget was injured by broken glass, left lying in a pond in a public park owned by a local Council. Was he entitled to compensation? The Court had first to decide whether he was a licensee or an invitee. After hearing the evidence, the Court adjudged him to be a licensee, for although he had permission to enter the park, there is no common interest in law between a local Council, which owns a park, and the members of the public who visit it. Being a licensee, he was entitled to be protected against concealed traps, or hidden dangers, which were known or ought to have been known to the Council, but he was not entitled to any further protection. The second problem for the Court was whether or not the presence of the glass, admittedly a hidden danger, was known, or ought to have been known, to the Council. Again the Court considered the evidence, and after doing so they answered this question in the negative. There was no legal justification for contending that the Council ought to have known that other frequenters of the park would leave a piece of broken glass in the pond, and the Council was therefore not under a liability to Fidget, and his claim for damages failed. Had the first question been answered differently, and had the Court decided that the boy was an invitee, it is possible they might have decided that the presence of the glass, irrespective of the knowledge of the Council, was a breach of the duty owing by the Council to an invitee to protect him from an unusual danger. If

the Court had come to such a decision, the boy would have received compensation.

You will be acting unreasonably if you blame lawyers for the difficulty of ascertaining the law. The law has been moulded by lawyers to meet the incidents of daily life, and is largely based upon the dictates of humanity, reason and justice. Judge Doc and Judge Roc may each, however, have very different ideas as to the meaning of these three virtues. Would you have it otherwise? Would you be satisfied if we all thought to an identical pattern? Unless your answer to these questions is in the affirmative, it is not fair to accuse lawyers of not knowing their own minds, and you ought not to grumble at the uncertainty of litigation.

NEIGHBOURS

'Mr. Snoot: "Milord, I rely upon Swale v. The Ecclesiastical Commissioners. Milord, the snails in defendant's garden were not brought there by her, and are not under her control, being at liberty at any time to cross the wall into the plaintiff's garden. Milord, I ask you to rule that the snail is an animal *feræ naturæ*.'"

Sir Alan Herbert, M.P.

Most of us like to be on friendly terms with our neighbours. This is more easily accomplished if we understand and appreciate our legal rights and our obligations towards each other, and the duties imposed on all owners of property.

The first right of an owner and occupier of property is a right to undisturbed possession. Undisturbed possession means possession undisturbed by unlawful interference. You will recall that although it is, for practical purposes, impossible to obtain redress for a casual trespass, the Courts may grant an injunction to restrain a deliberate trespass, accompanied by a threat of repetition. If an ill-mannered neighbour insists upon encroaching on your property, and refuses to respect your rights, you are entitled to apply to the Courts for an injunction.

To deal with physical interference of this character is comparatively simple. Difficulty is experienced when you approach the problem of intrusion of a less personal character. Interference may take a number of different forms. It may be visible—*e.g.*, a flood of water escaping from your neighbour's garden, the spread of branches from a neighbour's tree, the drift of smoke from a bonfire or a factory chimney, or even an aeroplane flying over your house. It may, alternatively, be invisible—*e.g.*, it may consist of noise, fumes or smells. It may consist of something even less easy to define—*viz.*, a shadow across one of your windows as a result of a high building newly erected by your neighbour on his own property. Yet again it may be an intrusion on

your favourite flower-bed by an animal which belongs to your neighbour.

Which of these incidents constitute an offence against your legal rights? Which can you restrain? No general answer can be given, as the same legal principles are not applicable in each case, and it is therefore necessary to consider each in turn.

The legal owner of property has a positive duty not to permit a dangerous object which he has brought on his land to escape when it may cause injury. The dangerous object may be either animate or inanimate. Water, for example, is classed as dangerous, because it may cause damage if it is allowed to escape. Your neighbour may have built a pond in his garden, and the brickwork which encloses the pond may collapse without any blame attaching to him, or even without his knowledge. He will nevertheless be responsible for any damage done by the escaping water, and he cannot, normally, rid himself of this liability.

Now let us turn to the overhanging tree. What principle is to be applied to this problem?

The owner of property is entitled not only to the soil on which the property stands, but also to all that is above and below it in a perpendicular plane. Subject to an exception which will be noted later, he is therefore entitled to the uninterrupted right of the air above the land. No one may interfere with this, and no one may build a structure on his land in such a way as to cause part of such structure to overhang his neighbour's garden, even although its foundations are on his own soil. On this principle, therefore, the branch of a neighbour's tree which overhangs your garden is an infringement of your legal rights. It is an infringement of your right to the ownership of the air over your land. You are entitled in law to remove the overhanging branch. Even although it is not your tree, you need not first ask your neighbour to cut off the branch, but you may lop it up to the boundary of your land without any notice to him. To lop a branch without notice is, however, not recommended in the interests of good-neighbourly relations. It

is preferable to discuss the matter in a friendly way, only resolving to exercise your legal rights if an amicable settlement cannot be reached. If you have to enforce your legal right, you will find that the law in this instance is subtle. You are entitled to lop the overhanging branch, and, if there is a crop of ripe fruit on it, and you are avaricious, you may consider it an advantage to do so. If, however, you are imprudent enough to pick the fruit, either before or after you have lopped the branch, you will lay yourself open to an action for damages for conversion—*i.e.*, appropriation of your neighbour's property. The tree and everything on it belongs to your neighbour. An overhanging branch is not your property. The basis of your right to lop the branch is the infringement of your legal right of ownership over the area which rises perpendicularly from your soil. When the branch is removed, it ceases to be an infringement of your legal right, and the branch still belongs to your neighbour. Provided he approaches in an orderly manner, he would be entitled, when you have cut off his branch, to enter your land in order to remove it (with the fruit). You would not be entitled to prevent him from doing so. He would have the same right to enter your land as the man referred to in the previous chapter who comes to fetch his umbrella. He would not be a trespasser when he does so.

As you have the same rights to the soil below your land as you have to the atmosphere above it, the same principles apply to roots from your neighbour's trees as apply to overhanging branches. It should, however, be noted that you commit a tort if you carry out excavations on your land, which result in a subsidence on your neighbour's land. A man is entitled to 'lateral support' from his neighbour's land, and, if he is deprived of this, and his land falls, as a result of digging operations carried out by his neighbour, he is, generally speaking, entitled to damages.

There is one exception to your right to the atmosphere over your land. Regulations have been made which permit the flight of aeroplanes over property, for it will be appreciated that if that had not been done, the situation would

have been chaotic. No aeroplane would have been able to fly without being exposed to the risk of an action for trespass.

The drift of smoke from a bonfire raises a problem of a different character. Smoke may be what is known in law as a 'nuisance'. Nuisances are classified either as public nuisances or private nuisances.

A public nuisance is, generally speaking, an act not warranted by law or an omission to discharge a legal duty, which obstructs or damages the public in the exercise of their legal rights, or their rights as members of the community.

You will recollect that in Chapter 2 it was explained, broadly speaking, that an act which causes injury to man, his property, or his reputation, is 'an act not warranted by law', and if a failure to 'do one's duty' results in an injury to a third party, it may be an 'omission to discharge a legal duty'.

A public nuisance may be of a quasi-criminal character. It is an offence against the community, as distinct from an offence against the individual, and as such it may usually be prosecuted in a criminal Court. For example, if you place a barrier across the high road, you are creating a public nuisance. It affects and obstructs everyone who is lawfully using the highway, and you will be laying yourself open to a criminal prosecution.

A private nuisance, on the other hand, is an unlawful act which affects a neighbour—using the term in its broadest sense. It has been defined as an act or omission which causes inconvenience or damage to a private person. Such an act is unlawful, but it will be left to the individual to seek his own remedy through the civil Courts.

The word 'inconvenience' must not be taken in too literal a sense. Not every unlawful act which causes inconvenience is a nuisance. Every occupier of property has a right to certain amenities, but this is no more than a right to occupy it free from interruption, physical or otherwise, which would not be tolerated by a reasonable man adopting reasonable standards. He has not a remedy for every inconvenience.

Bearing these matters in mind, you will appreciate why

smoke is not necessarily a nuisance. It is only a nuisance, generally speaking, when it would not be tolerated by a reasonable man adopting reasonable standards. Smoke from an occasional bonfire would not normally constitute a nuisance. Smoke, belching, more or less continuously, from a factory chimney, might, however, be either a public or a private nuisance, according to the extent of the affected area.

The owner of a factory which emits smoke may, accordingly, have to face legal action at any time, and he may have to accept responsibility, not only if he has directly caused the smoke, but also if he has allowed it to arise by neglect of duty, or if he has omitted to remedy the nuisance within a reasonable time after he became, or ought to have become, aware of it. It is immaterial if the smoke is allowed to drift deliberately, negligently or accidentally. It is his duty to take proper precaution to prevent the nuisance, either by the erection of a chimney of sufficient height to carry smoke at levels where it will not cause inconvenience, or by other methods.

Noise and 'offensive and pestilential smells and vapours' (as they may be legally described) are all to be judged by the same standard. They may all be capable of constituting a nuisance, and in each case the 'reasonable man' test is to be applied—*i.e.*, you must decide whether you would expect the act complained of to be tolerated by a reasonable man adopting reasonable standards. In every case the question of what is a 'reasonable standard' is a question of fact, to be decided by the Court after evidence has been considered on all the relevant matters.

There is one special case in which you might reasonably describe a nuisance as a 'damned nuisance', but yet it is not a legal nuisance. It applies to building operations. As a nuisance consists essentially of an act not warranted by law, or an unlawful act, and building operations are lawful, the fact that they are at times necessarily of an excessively noisy character does not render the operation unlawful. The law does, however, require a builder to take steps to minimise

noise, as far as is reasonably practicable. Moreover, the work must be confined to reasonable working hours, except in the case of an emergency. It must not be a continual round-the-clock operation which prevents adjoining occupiers from enjoying a night's rest. If a builder fails to comply with these obligations, his operations may cease to be lawful, and he may find he has no defence to proceedings brought against him to restrain the nuisance.

Interference to the light which you enjoy over your property is classified in a different manner from other interference. As every person theoretically owns the air over his land, he is entitled to build on the land. If the building is erected so that the outer walls rise perpendicular from the boundaries of the land, and is of such a height as to obscure the flow of light to the adjoining occupier, such adjoining occupier is unfortunate. Subject to certain qualifications, he has no remedy, for the owner of the land is making lawful use of his land, and so long as he does not overstep his boundaries, his neighbour has no legal remedy. He is not committing a nuisance. There are, however, two important qualifications to this rule. The first arises if John Doe, the owner of the land on which the offending building is erected, also owns the adjoining property which is occupied by his tenant, Richard Roe. In such circumstances, John Doe may not erect or allow the erection of any building on the adjoining land, if such building would substantially interfere with the light which Richard Roe is already enjoying. Secondly, if John Doe has enjoyed light over his property for an uninterrupted period of twenty years, his property acquires what is called a 'prescriptive' right to light. His property is then entitled to a privilege called 'ancient lights'. This means that there are limits to the building or obstruction which may be erected by an adjoining owner, so far as they may interfere with the amount of light John Doe or his predecessors have enjoyed for the previous twenty years from his building. Emphasis must be laid on the word 'building', as there is no right of light in favour of an open space. It applies only to buildings. The interference must also be substantial. 'Sub-

'substantial' is in each case a question of fact. A shadow cast across your window is unlikely to be a substantial interference, or an infringement of a legal right. If you have occasion to complain of the erection of a building on adjoining land, when you are enjoying the privilege of 'ancient lights', you have to consider whether the loss of light is such as to render the occupation of the building uncomfortable, according to the ordinary notions of mankind, and whether it prevents you from carrying on a normal business on the premises as beneficially as you did prior to the obstruction. In each case the Court must take all relevant factors into consideration, and then decide, as a question of fact, whether there has been a substantial interference to the light previously enjoyed for normal business purposes.

The responsibility for damage caused by animals depends to some extent on whether the animal is classified as wild or domestic.

Wild animals include all animals which are both untamed *and* not subject to human control. The law does not, generally speaking, recognise any ownership of wild animals, although there are exceptions to this rule, and the subject is complicated. No one, generally speaking, is responsible for any injury caused by a wild animal, but it is necessary to appreciate the importance in the definition of the qualifying words 'not subject to human control'. The owner of a zoo has many animals popularly described as 'wild animals'. As, however, they are under his control, the owner will be responsible if they break loose and cause injury. A wild animal is dangerous, and the owner of a dangerous animal must never allow it to escape, or he will be responsible for the damage which it causes. Other animals, such as cattle, are not wild animals, but they may, nevertheless, be dangerous. If John Doe has any animal which he knows, or ought to know, is dangerous, he must normally keep it under proper control. If, for example, his cattle are allowed to trespass on Richard Roe's property, John Doe will normally be responsible for any damage they cause. He may only escape liability if Richard Roe is under a legal

obligation to secure his own boundaries, and the cattle have strayed on his land, because he has neglected his duty.

Domestic animals include not only all the family pets, but even camels. They are, generally speaking, assumed to be harmless. This assumption may, however, be overcome if proof is given that the owner knew that they were not, in fact, harmless. For example, although you may have no remedy if Mr. Doe's dog attacks and injures you without provocation, you will be in a position to claim damages if you can bring evidence to prove that the dog had previously attacked a man, and that the owner therefore knew that he was not harmless. This is the origin of the popular theory that every dog is allowed one bite. When he has had his bite, the owner is no longer able to claim that he thought the dog was harmless. He is caught by the legal doctrine called 'scienter'—i.e., 'knowingly'. He must thereafter keep the dog under proper restraint, or he will be responsible for the consequences. The same responsibility rests upon the owner of any other domestic animal, if he has knowledge of it being a danger. If he fails in such a case to keep it under proper control, he will be negligent, and will incur the same responsibility as for any other act of negligence.

It may be of interest to note that the owner of bees is not responsible for any sting which one of his disgruntled pets may cause. Bees as a class are regarded as wild animals, and there is, generally speaking, no ownership in a swarm of bees. When, however, they have been hived, they are the property of the owner of the hive. If they leave the hive in order to swarm, their owner may follow them so far as he may see and reach them. If, however, they elude him in the chase, he loses his right of ownership, and a stranger may hive them and retain them for himself.

You are entitled to stop a man if he wrongfully comes on to your property, and you are also entitled to restrain a trespass by cattle. If, however, the visitor is a dog or a cat, other legal considerations arise. If you wish to safeguard flower-beds from the intrusions of dogs, it is your duty to protect your boundaries in such a way that they are unable

to obtain access. If you leave your gate open, and a dog walks in and scratches up your favourite flowers, in his desire to explore every avenue, and leave no bone unturned, you have no remedy. Your neighbour has a similar duty to protect his own boundaries. If his dog comes through the boundary fence, however, you will have no right to complain, since you are both at fault. If, however, a hen comes through your fence and lays an egg on your ground, you are not entitled to keep the egg, as your weekly allocation. It is not your property.

There is a distinction to be noted between the legal position which arises if a cat kills your chickens and if a dog kills your chickens. In the former event, you have no remedy. In the latter case, you may claim compensation from the owner of the dog. The Dogs Act 1906 expressly renders an owner liable if his dog destroys chickens, irrespective of 'scienter'.

The owner of a dog is also liable for injury done to cattle, and where a dog is proved to have injured cattle or to have chased sheep, it may be treated as a dangerous animal, and must in future be kept under proper control, or destroyed.

Boundary fences or party walls often present problems. If you are able to ascertain, as a fact, from the deeds of the property that a particular boundary fence is your fence, it is your duty to repair it, and you will be liable for damage caused by your failure to repair it. Your neighbour is similarly responsible for the upkeep of his boundary fence. Frequently, however, it is extremely difficult to ascertain the ownership of a boundary fence, and in the absence of definite proof it is better to assume it is a party fence for which each party has, generally speaking, equal liability. It is better to come to a friendly agreement as to its repair, than to engage upon aggressive controversy.

When differences arise between your next-door neighbour and yourself, it is no bad thing to start off with an appreciation of the moral duty you owe to render him every kind act which justice may require, and then to act towards him as in similar cases you would wish him to act towards you. If you do this, there should never be any difficulty in adjusting

differences which may arise between you, unless your neighbour is a deliberate enemy of society. If he is one of that class, it is his misfortune, and not yours. Such a man is nearly always unhappy, and in his eyes everything you do will be wrong, because it reflects his own conduct. If you should, unfortunately, be driven to take Court proceedings to obtain the redress you are seeking, and you succeed in your action, your neighbour will henceforth declare that there is no such thing as 'British justice'. A wise man may, however, safely ignore the judgment of fools.

LIBEL AND SLANDER

'In *Silvertop v. The Stepney Guardians* a man trained a parrot to say three times after meals, "Councillor Wart has not washed today". It was held that this was a libel.'

Sir Alan Herbert, M.P.

If you write and publish statements which are defamatory or derogatory of another member of the community, you are said to libel him. Libel as a tort may give rise to an action for damages. In some circumstances it may lead to criminal proceedings. If the defamatory statement is published verbally, as distinct from being in writing, it may result in a civil action for slander, but never in criminal proceedings. In order to succeed in an action either for libel or for slander, it is usually essential to prove that the defamatory statement is calculated to bring the person of whom it is written or spoken into 'hatred, ridicule or contempt', or to damage him by reflecting adversely upon his credit or his business capacity.

Reproduction in a permanent form, as, for example, in a written statement, as opposed to the spoken word, is the great distinction between libel and slander, but to refer to a libel as a written statement is speaking only in very general terms, as it includes any statement which is written, printed or depicted in some permanent form. It extends to pictures as well as to written words, but although no civil action will lie for damages for libel unless it has been published to a third party, publication is not an essential ingredient in a case of criminal libel. For example, let us suppose that John Doe thinks he has been defrauded by Richard Roe. In an outburst of indignation he writes to Richard Roe, accusing him of being a 'swindler who ought to be in gaol', and adding other equally elegant phrases. He addresses it to Richard Roe, and, knowing little, but too little, of the law, he marks the envelope 'Private and Confidential', thinking that this will save him from any legal retribution. John Doe is, however, mistaken.

If Richard Roe 'sees red' and feels, when he reads the letter, that he would like to take a horsewhip to John Doe, Richard Roe is entitled to apply to a police court for a summons for criminal libel. John Doe's conduct is calculated to provoke a breach of the peace, and it is therefore an offence against the community. It will not avail John Doe to prove as a defence that every word of his letter is true. 'The greater the truth the greater the libel' is a maxim which applies in criminal libel, and a defendant must not only prove truth, but also that the defamatory statement has been written and published in the 'public interest'. Public interest in this sense means a genuine public concern in the matters published, and not mere idle curiosity. It is insufficient to prove that the libel was published to satisfy one's own personal desire for revenge or retaliation. It is only in a civil libel action that justification, or proof of the truth of the defamatory matter, gives a complete defence to the claim, and proof of public interest is then immaterial.

There are other defences available in proceedings for criminal libel. The defendant may, if the circumstances so warrant, plead a defence of privilege, or of fair comment on a matter of public interest. These defences, equally available in a civil action, are dealt with later in this chapter. It is also relevant to bear in mind that Richard Roe may be reluctant to set the criminal law in motion. He is sometimes unlikely to enjoy the prospect of publicity, or the risk of a subsequent prosecution for fraud. In some cases John Doe would have the sympathy of the Court, and even if found technically guilty of a criminal libel, he might merely be bound over to keep the peace, without incurring further penalty.

Somewhat akin to the subject of criminal libel is the crime of sedition. Sedition consists of the speaking or writing of words calculated to excite disaffection against the constitution, and to procure the alteration of it other than by lawful means, to incite any person to commit a crime to the disturbance of the peace, to raise discontent or disaffection, or to promote ill feeling between different classes of the com-

munity. It has been suggested that a charge of sedition should be brought against anyone who organises attempts to introduce fascism or nazi-ism into this country. The vagueness of the law, and the English passion for free speech appear, however, to render this course difficult. Many agree, moreover, that it is wiser to ignore a few pusillanimous cranks, for nothing would give these young Schickelgrubers greater pleasure than the publicity of Court proceedings, and any resulting 'martyrdom'.

When criminal proceedings are not under consideration, a person who has published a defamatory statement may have an action for damage brought against him in the High Court. Proof that the defamatory statement is true 'in substance and in fact'—*i.e.*, that the whole of the defamatory matter is substantially true—is an absolute defence to the claim, and entitles the defendant to ask that the action shall be dismissed.

When a plaintiff succeeds in an action for libel he may be awarded damages, even although he does not prove that he has suffered any pecuniary loss. The law assumes that a written communication published to a third party will cause damage to reputation, if the communication is defamatory. This, however, is not the case in an action for slander. A slander, being a spoken word, does not, in theory, leave the same permanent record as a libel, although Sir Alan Herbert was evidently of the impression that his parrot referred to at the heading of this chapter provided an exception—and he may well be right in so doing. Be that as it may, the law does not, as a general rule, entitle the plaintiff in such an action to recover damages, unless he is able to prove actual pecuniary loss. There are, however, some exceptions, and the following are the excepted cases:—

- (1) Statements which impute crime punishable by imprisonment.
- (2) Statements defamatory of a man in the way of his trade or business, and not merely attacking his moral character.

(3) Statements accusing a woman of adultery, or of not being chaste.

(4) Accusations of certain contagious or infectious diseases.

You will observe that the exceptions entitle you to say of a man that he has an illegitimate child, without fear of the consequences, unless he is able to prove pecuniary loss, but you expose yourself to an action for damages if you accuse a woman of the same offence.

To illustrate one aspect of the law of defamation, let us assume that Joan Doe, the wife of John Doe, is shopping at the local Stores. She purchases and pays for several articles, which she places in her bag. The shop is crowded, and as she is leaving, a man approaches her and asks her to accompany him into the manager's room. She goes with him, surprised, but unprotesting, and when she arrives, the house detective—as the man proves to be—tells the manager, in polite terms, that he has seen Joan Doe pick up a pair of stockings from a counter, put them in her bag and walk away without paying for them. Joan is horrified at the accusation. It is true that she has a pair of stockings among other articles in her bag, but she declares she has paid for them. She admits she is rather careless and muddle-headed about accounts, and she fumbles in her bag, but without success, to find the bill she has received. The manager then insists upon taking her name and address, which she gives him. Later, when she arrives home, she finds the bill. It is unquestionably a properly receipted bill for the pair of stockings which she has purchased. What ought she to do?

We have spoken of 'publication' as an essential feature in all civil proceedings for libel and slander. Publication, in broad terms, means the communication of the defamatory statement to a third party, for John Doe may accuse Richard Roe of every crime in the calendar in the privacy of his own home, without fear of a claim for damages. In the case under consideration, the statement made by the house detective to the manager is sufficient to support the plea of publication.

The next matter to consider is whether or not the words were defamatory. Whatever may have been the actual words in which the house detective conveyed his message to the manager, and even if the detective had not used words directly accusing Joan Doe of having stolen a pair of stockings, this was the implication or 'innuendo', as it is called, and innuendo plays an important part in the law of defamation. You may say of a woman that she is 'a fine example of chastity', but if you say it in a context, and with a tone of voice and an expression which means, and conveys to your audience the meaning, that she is unchaste, the injured woman may be able to bring proceedings against you. You cannot escape liability by pleading that you have not used any defamatory expression. The innuendo, if proved, may be sufficient to support the complaint, and the result will be the same as if you had used blunt language instead of sarcasm. You may colloquially 'convey a libel in a frown, and wink a reputation down'. Substitute the word 'slander' for 'libel', and the sentiment is not very wide of the mark from a legal aspect.

As, then, Joan Doe has been accused of theft, a criminal offence punishable by imprisonment, her case falls within one of the exceptions which entitles a plaintiff to damages without proof of 'special damage'. She will also be able to bring her action against the Stores, since they are responsible for the tort of their employee, committed within the scope of his employment. She will not, however, necessarily succeed in her action. She will probably be met with the defence that the words were uttered on a 'privileged occasion'.

'Privileged occasions' fall into several categories. When a Judge, or other judicial officer, sits in Court for the purpose of administering justice, he is frequently compelled to make statements which are of a defamatory nature, either about the parties immediately concerned in the case before him, or about other persons. In order to enable him to do his duty, without fear of legal proceedings, he is, accordingly, absolutely protected from the consequences of any defamatory statement made by him. The occasion is

said to be a 'privileged' one, and all statements made by him in this official capacity are 'privileged statements', made on a privileged occasion. The privilege admits of no exception, but it does not, of course, extend to statements made by the official in his private life.

A similar protection is extended to Counsel who conduct cases, and to witnesses who give evidence. If a witness did not dare to speak the truth, because it might involve him in litigation, he would be placed in an impossible situation. On the same principle, all statements made in Parliament are absolutely privileged, for it would be contrary to the tenets of democratic government if a Member of Parliament was unable to speak freely for fear of legal consequences. Nevertheless, unfortunately, this privilege is sometimes abused.

The foregoing are examples of 'absolute privilege'. 'Qualified privilege' is not so all-embracing. It applies when a defamatory statement is made and received in pursuance of a legal or moral duty or obligation. For example, if an employer is asked to give a reference for a former employee, he has no legal duty to comply with the request. If, however, he feels morally obliged to do so, he is entitled to exercise the right. If he sends a letter to the prospective employer, saying he dismissed the employee for suspected theft, he is making a defamatory statement, but he may have a good defence to proceedings brought against him for libel, on the ground that the statement was published on a privileged occasion.

A defence of qualified privilege fails, however, if the statements are made maliciously, or if they extend beyond the necessities of the case. Malice may be defined in this connection as any improper motive, but the definition is one which itself requires definition. The word 'improper' does not necessarily mean deliberately improper. For example, a statement which is unfair or unreasonable may be improper, as may also be one which is reckless or careless.

As it is a tort to make defamatory remarks of any member of the community, they are deemed to be malicious. If you libel John Doe, the law will presume malice, even if you

had never heard of him until after he has commenced his action against you. If you have described 'John Doe' in a work of fiction in such a way as to enable a real John Doe to bring evidence from reasonable men that they thought your references to 'John Doe' were references to their friend or acquaintance of that name, you may have damages awarded against you. On the occasions when you are entitled to rely upon a plea of qualified privilege, however, you escape liability if you can rebut this presumption of malice—*i.e.*, if you are able to satisfy the Court that you had an honest belief in the truth of your allegations.

If, on the other hand, there had been a quarrel between employer and employee before the latter was dismissed, there will be grounds for supposing that a reference given by the employer, stating that the employee was dismissed for theft, is untrue, and was given maliciously. In that event, the employer will not be able to rely upon the plea of qualified privilege. Even if he suspected the employee of theft, the plea will be of no avail, for suspicion is not always honest belief, and he may be found to have made the accusation recklessly, and without regard to the facts. Beware, also, of the man who prefaces a defamatory remark with the words 'I feel I have a duty to perform'. The term is frequently used by hypocrites who hope, in this way, to conceal their malice.

If Joan Doe brings an action in respect of the allegation that she has stolen the stockings, she will almost certainly be met with the defence that the accusation was made on a privileged occasion. It will be said that the house detective had a duty to make his report, and the manager had a duty to receive it. There may be a plea that the detective had an honest belief that the stockings had been stolen, and it may be contended that the accusation was made with discretion. If, of course, the detective had made the accusation in the shop, instead of in the manager's room, the plea of privilege would probably be of little avail, since his duty to his employers would not have required him to accuse Joan Doe of theft in presence of the other customers in the Stores, who

had no legal interest in the information. The detective had therefore acted correctly when he invited Joan Doe into the manager's room, and the question which the Court would have to decide, on the evidence, would be whether or not malice was established so as to defeat the plea of privilege. If the case comes into Court, the detective may say, when he gives his evidence, that Joan Doe had behaved suspiciously and had loitered on the premises, picking up first one article and then another. He will, however, make matters worse if the Court disbelieves his evidence, and is satisfied that Joan Doe had, in fact, paid for the stockings. In that event the Court would be more ready to find that the accusation was malicious. Malice can be shown at any time, and if the detective makes an effort, by evidence of this character, to save his own skin at the expense of Joan Doe, he will be acting with an improper motive and will make it easier for Joan Doe to win her action. If, on the other hand, he honestly admits an error, and can satisfy the Court there has been a genuine and reasonable mistake on his part, as a result of the similarity in the appearance of two women, a plea of privilege would stand a better chance of success.

Irrespective of the legal position, however, Joan Doe would, generally speaking, be well advised to accept the gift of a dozen pairs of silk stockings, which the Stores will probably be pleased to offer her in order to escape the unpleasant exposure of their representative's blunder. She has suffered no injury except to her dignity, and emphasis has already been laid on the uncertainty of litigation.

A further plea open to a defendant in a libel action, in some cases, is that of 'fair comment'—*i.e.*, that the statements amount to no more than fair criticism on a matter of public interest. Everyone has the right to criticise his friends, and even his enemies, freely, on matters of public interest, without fear of legal consequences, provided the criticism is a fair comment based on the facts of the case. Such criticism is frequently unpleasant to the person criticised, but he will not have any legal remedy. It is, however, essential that the facts of the case should be correctly stated,

for no criticism can be fair if it is not made upon accurate facts, and a defence of fair comment in a libel action must inevitably fail if the author of the libel has allowed his imagination to run riot, and has based his comments on fancies which depart from sober truth. If, for example, a boxer has been booed in the Ring, he has no legal remedy if a boxing critic reports the fact, and adds, by way of comment, that it would be better for the sporting world if the boxer were to give up boxing. Both the newspaper and the critic, if identified, would be entitled to plead a defence of fair comment. On the other hand, if a newspaper critic expressed the same opinion, based on the same allegation, but added gratuitously that the boxer was unfit to appear in any Ring, because he never took the trouble to train before a fight, a plea of fair comment would fail, unless the newspaper were able to prove the truth of the allegation.

It should be noted that when a newspaper publishes a defamatory article, it is, broadly speaking, in no better and no worse position than a private individual. The freedom of the Press does not mean that a newspaper, any more than a private individual, is licensed to attack the character of members of the community. As, however, it is essentially the function of the Press to keep the public informed on matters of general interest, the Law of Libel Amendment Act 1888 contains provisions which entitle newspapers to publish contemporaneous reports of parliamentary and judicial proceedings, and also of public meetings. No action will lie against a newspaper for publishing a report which is defamatory, provided it is a fair and accurate summary of the proceedings, unless the plaintiff is able to prove that the report was published maliciously.

A brief reference may here be made to an action analogous to that of libel—viz., an action for damages for malicious prosecution. If John Doe charges Richard Roe with theft, and the latter is brought up in a Police Court and subsequently acquitted, he is entitled, in certain circumstances, to sue for damages. To succeed in such an action, he must prove, (1) that he has been acquitted, (2) that John Doe has acted

without reasonable and probable cause, and (3) that John Doe has acted maliciously.

Actions of libel and slander, and also actions of malicious prosecution, are all heard by a jury in normal times. Juries in civil actions were virtually suspended during the war, but the Government has stated that it proposes to consider the question of their restoration, when the new Jury lists of those liable to serve on Juries are prepared early in 1947. It is the function of the jury to decide questions of fact, and, if the plaintiff has established his case to their satisfaction, they must assess the amount of the damages. There is no scale which will help them to carry out this duty. If they consider there is no merit in the action, and that it ought not to have been brought, although the plaintiff has technically been libelled, they may award him 'contemptuous' damages of one farthing. At the other end of the scale, the jury may award punitive or penal damages—*i.e.*, a sum far in excess of any loss which the plaintiff may have suffered. A jury may award such damages to mark their sense of disapproval of the defendant's conduct, when the libel is gross or excessive. Normally, however, the amount of damages which a jury should award after taking every circumstance into consideration, is such a sum as is fair and reasonable to the plaintiff, and higher damages may be awarded if the defendant has relied upon a plea of justification which has failed.

Before the members of a jury reach any decision they will always receive guidance from the Judge in his summing-up of the case as to the issues of fact which they must decide, and the basis upon which damages are to be awarded, if they find the facts to be in favour of the plaintiff. In the absence of a jury issues of fact must be decided by the Judge, as well as questions of law. He must, accordingly, assess the amount of the damages, and he will be less inclined than a jury to award punitive damages, since, in contrast with a jury, he has power to vindicate the plaintiff's character when he delivers his judgment.

The law relating to libel has the same imperfections as

other man-made laws. There is agitation by Press and publishers that no person should be entitled to compensation, unless he is able to prove financial loss, as a result of a defamatory statement. There is much to be said for this agitation. The existing law lends itself to abuse, when a confirmed criminal is able to recover damages, because he is accused by a newspaper of the one and only crime which he has never committed. In such a case the newspaper must virtually let the case go by default since it cannot plead either justification or fair comment with any hope of success. On the other hand, there would doubtless be injustice to the individual if the existing rules were modified to any substantial degree. If you are avoided by your friends as a result of a false and defamatory report in a newspaper, it may not be possible for you to prove financial loss. To some people, however, loss of character is of more concern than loss of money.

No law is ever fair to everyone, and if you consider all aspects of the matter impartially, and have no personal interest in the question, your opinion is as good as your neighbour's. There is, perhaps, a case for reform, but if any reform is introduced, it will be essential to make sure that it does not cause as much injustice as it cures.

LEASEHOLDS AND LEASES

'A man called at the Town Hall to see the Town Clerk. "Who is my Landlord?" he asked the Town Clerk. "To whom do you pay your rent?" enquired the latter. "I've been in the house since 1939," said the man, "and I haven't paid any rent, but if someone doesn't repair my roof soon, there's going to be a row."'

Origin Unknown

THE relation of landlord and tenant is created whenever there is an occupation of property under a lease, or an agreement to let, granted by the lessor or landlord, to the occupier—the lessee.

A lease is a letting of property effected by deed. A tenancy agreement embodies the terms agreed between the parties, as distinct from the more solemn 'covenant'. When a tenant has entered into occupation of land, and has paid rent under a verbal agreement, the doctrine of part performance, referred to in Chapter 3, may enable the tenant to enforce the verbal agreement, in spite of the general rule that a contract relating to land may be enforced only if it is in writing.

Although there is a form of tenancy called a 'tenancy at will' which may be terminated by either party without notice, land which is demised, *i.e.* leased or let for any agreed term, must always be so for a period which can be fixed by reference to some certain date or event. For example, a lease to endure for the life of John Doe will be good, but a lease granted for a term to continue until such time as the Derby is won by a piebald horse would not be a good lease. It would be void for uncertainty. It would, however, be a good lease if it were for a term of 500 years or until the Derby is won by a piebald horse, whichever period might be the shorter, for in that event its maximum term is fixed. There is no limit to the period for which a lease may be granted, and there are many still in force which were originally granted for 999 years.

When a lessee proposes to build a house on the land which has been leased to him, the lease is usually called a building lease or a ground lease. At the end of the lease, the ground must be handed back to the successors in title of the original lessor, together with the premises built on the land, and the lessee is not entitled to be paid any compensation. Rent is the amount of the consideration—usually monetary—payable to the landlord periodically for the use and occupation of demised premises. It may be either a 'ground rent' or a 'rack rent'. A ground rent is normally equivalent to the annual value of undeveloped land. If, for example, John Doe proposes to grant a building lease to Richard Roe on a piece of land worth £200, he may expect to receive each year, in lieu of interest on his money, a sum of between 6% and 10% of the value of the land, and the ground rent payable under such a lease might, accordingly, be a sum of between £12 and £20 a year. When, however, Richard Roe has erected his house at a cost of £1,000 he may decide to grant an underlease of the premises, and in that case he will either charge a premium and an annual ground rent, or he will require payment of a rack rent—*i.e.*, the full annual value of both the land and the house. The annual amount he may then expect to receive would be a sum of between £72 and £120, being 6%–10% on the £1,000 which he has spent in building the house, together with the ground rent of £12 to £20 which he himself has to pay.

That is the theory. In practice, as a result of the housing shortage, the mathematical calculations of the return which John Doe may expect to receive are not applicable. Officially the property market is not described as a black market, but subject to the Rent Acts and recent legislation which applies to the houses referred to in the next chapter, a landlord may let his house or flat to the highest bidder, and like other things in short supply, he frequently obtains a rent far in excess of the annual value of the property. It is not necessarily reasonable to blame the landlord for acting in this way. The 'ill-used tenant' sometimes becomes the 'grasping

landlord', and, when he does so, he, in his turn, usually accepts the highest rent he is offered. Under our present economic system there is nothing dishonest or immoral in this course. As, however, a roof over every head is a necessity and not a luxury, there is a strong argument in favour of controlled rents for all houses, in the same way as controls are applied to other goods in short supply. It is right to add, however, that the ownership of property has not, in general, been very remunerative since 1914. Restricted rents in the case of controlled properties, together with war damage and war-damage insurance, have all placed heavy burdens on landlords, and have robbed them of much of their former profit.

When John Doe has granted a ninety-nine-year building lease to Richard Roe, and the latter has built his house, he may prefer an outright disposal of his interest in the lease, instead of granting an under-lease. If he decides to do so, he is not, of course, in a position to *sell* the house. He can only *assign the leasehold*—*i.e.*, the interest which he himself has in the property—for the residue of the ninety-nine years. The purchaser of the premises is then called the 'assignee' of the term.

When you purchase a house, you will, of course, expect to pay less for it if it is leasehold than you would do if it is freehold—*i.e.*, one which will belong to you absolutely. For example, if you purchase in 1946 the residue of the term of a lease for ninety-nine years which John Doe had granted to Richard Roe in 1887 at a ground rent of £5 a year, you will have to base your calculations of a fair purchase price on your obligation to hand back the property to the successor in title of John Doe in the year 1986, when the lease expires—*i.e.*, the property belongs to you for forty years and no longer. In the meanwhile, you will have to pay the annual ground rent of £5. The price which you will expect to pay for the property in 1946 will therefore be the value of the house, without the land, after taking into consideration the loss of the capital you have invested in the property which will dwindle each year, until the year 1986, when you will have none left,

and by which time, for reasons which will be made clear, the house, instead of an asset, will have become a liability.

The terms and conditions agreed between the landlord and the tenant which are contained in a lease are, for the most part, technically called the 'covenants'. Occasionally a covenant may be implied, but you will recollect from Chapter 2 that this is exceptional, and if any important covenant is omitted, and a dispute is followed by legal proceedings, the Court may not add conditions, however reasonable, which it thinks ought to have been included in the lease.

The first covenant in a lease is usually the covenant by the lessee to pay the rent on the day on which it falls due, and most leases contain a provision which entitles the landlord to forfeit the lease and re-enter the premises on non-payment of rent whether or not a legal demand has been made for payment. Legal demand is a demand made on the premises between sunset and sunrise on the day on which the rent falls due. When no such demand is made, the landlord may only sue for forfeiture of the lease for non-payment of rent if there is a clause in the lease which expressly exempts him from the obligation of making legal demand.

The express covenant for payment of rent is required by the landlord, as, in the absence of such a covenant, the letting of premises would only bind the tenant to pay the agreed rent so long as he retained an interest in the lease, and he could rid himself of further liability at any time by 'assigning' or selling his interest in the lease.

The liability of the landlord and the tenant respectively for the payment of 'outgoings'—*i.e.*, general rates, water rates and other charges which may be levied against the owner or occupier of land—is an obligation which should always be defined. General rates are levied by the local authorities, and water rates by a statutory water company. They are the technical liability of the owner of the property, but by the terms of a lease the obligations are frequently imposed upon the lessee. When a house stands on a private road, there may also be a liability to the local Council for the cost

of making up the road, if it is converted into a public highway, and there are a number of other instances when liabilities of a similar character may arise.

Income tax, technically known as Landlord's Property Tax or Schedule A Tax, is an outgoing which falls into a different category. The Inland Revenue assesses a figure which is calculated to be the gross annual income which the owner may expect to receive from the letting of his property when he remains liable for repairs. After deduction of a sum assumed to be the reasonable amount which a landlord may expect to have to spend each year on repairs, insurance and management, the balance is called the 'net annual value', and the landlord is obliged to pay income tax on the net annual value at the standard rate of tax in force from year to year. At present this is 9s. in the £. The demand note for this tax is served on the person in actual occupation of the land, whether he is the owner or the tenant. If it is, in fact, paid by the tenant, the landlord is bound to allow the amount of the tax so paid as a deduction from the next payment of rent, on production by the tenant of the tax receipt. When a tenant agrees to pay 'outgoings', this does not include landlord's property tax, as the law compels the landlord to accept responsibility for payment of what is, in effect, his own income tax, and he is subject to the imposition of heavy penalties for any attempt at evasion. When, however, the tenant has paid an instalment of this tax, he must deduct the amount of the tax instalment from the ensuing payment of rent, or he may forfeit the right to do so at a later date.

Most important covenants in a lease are those which relate to repairs. The lease should always define the responsibility for repairs of the landlord and the tenant respectively. If the lease has no reference to the subject, the Court may only order the landlord to carry out repairs if the house is what is legally termed a 'small house'—i.e., if it is let at a rent not exceeding £40 a year in London and £26 a year outside of London, and if, at the same time, the letting is for a period of less than three years. In such a

case the landlord must keep the premises reasonably fit for habitation. In other cases and in the absence of express agreement, the tenant is deemed to undertake to use the property in a reasonable manner, according to the purpose of the letting, and he must do reasonable repairs. Other than in these respects, the Court has no power to assist either party if they have not recorded their agreement as to repairs in the lease.

For example, neither you nor your landlord may be under any obligation to repair a defective roof if there is no covenant in your lease which has reference to roof repairs. It is true that in such a case water may damage the property. On the other hand, it may also damage your furniture. Which of you will suffer a greater loss from a leaking roof? You and your landlord will have to consider this question, and come to your own decision, for the law will not be able to assist you. Moreover, the landlord is not responsible for rats, mice or beetles, even in the case of a furnished letting.

Repairing covenants assume a number of different forms, according to the character of the lease or tenancy agreement. The times are now abnormal, but under ordinary conditions they may be roughly classified in four divisions.

(1) In long leases—*i.e.*, those for a term exceeding twenty-one years—one would expect to find full repairing covenants. These are very onerous, as under such covenants the tenant must not only be prepared to carry out all repairs necessary to keep the premises in a state of good and substantial repair, even although they are in a state of bad repair at the time of the letting, but he must also be prepared to carry out all work necessary to hand the premises over to the landlord in a good and substantial condition of repair at the end of the term.

(2) In leases for a term of from seven to twenty-one years you may expect to find covenants under which the tenant agrees to carry out all interior repairs, whilst the landlord will agree to carry out external and structural repairs.

(3) In leases for a term of from three to seven years, it is reasonable for the tenant to agree to keep the interior of the premises in the same state of repair as they are at the time of the letting, but without any further obligation on his part. The landlord will on his side undertake external and structural repairs as in the previous case. In order that the tenant's covenant should be effective in this case it is necessary for a schedule of the condition of the premises to be taken at the commencement of the term, and this can then be checked when the lease comes to an end.

(4) In short tenancies it is unusual for the tenant to assume any serious responsibility, and the covenant usually requires him to keep the premises in a good state of repair, 'fair wear and tear excepted'. This means what it says, and a careful tenant will seldom be called upon to pay anything for want of repair, although it does not, of course, relieve a tenant of responsibility if his children scribble over the walls. In such a case he must expect to be called upon to pay for any damage caused.

It is necessary to emphasise that these four categories are not 'cut and dried'. There may be a number of variations, and the exact covenant in any particular case is one for bargaining between landlord and tenant when the negotiations for the lease are under discussion. It is also essential to remember that when houses are scarce, landlords are more exorbitant in their demands than when there is an abundant supply of houses. By war legislation all covenants in a lease which required the lessee to carry out repairs were expressly declared to be of no effect, in so far as the repairs were required by reason of war damage.

Another usual covenant is that which deals with assigning and under-letting. A prudent landlord will always ask for references to establish the character and financial status of the proposed tenant. As, moreover, he will want to exclude undesirable occupiers in the future, he will usually require the tenant to agree not to 'assign underlet or part with possession of the premises or any part thereof' at any time during the term without his written

consent. Until 1927, demand for compensation could be made by a landlord when he was asked under such a clause to consent to an assignment or sub-letting, but the Landlord and Tenant Act 1927 no longer permits the consent to be unreasonably withheld by the landlord in the case of a responsible and respectable assignee or under-tenant, although it is still permissible for a landlord to prohibit all assignment and under-letting by express covenant. Moreover, recent legislation, necessitated by the housing shortage, allows tenants in certain cases to disregard the covenant in its entirety.

Assigning, *i.e.*, selling, and under-letting are two totally different transactions. If you assign or sell your interest in a lease which you hold from John Doe, you transfer it to the purchaser, and you yourself retain no further interest in the lease, subject to certain contingent obligations which are referred to hereafter. If, on the other hand, you under-let it, you remain a tenant of John Doe, and the under-lessee becomes your tenant. If you under-let it to Richard Roe, he will hold the property from you on whatever conditions you stipulate in your lease or tenancy agreement with him. Care must, of course, be taken not to include any conditions in the tenancy agreement which might lead to a breach of the terms in your own lease from John Doe. Unless caution is exercised in this respect, you may find yourself involved in legal complications. You may under-let the property to Richard Roe, and include a covenant which allows him to use the premises for a billiard saloon. If John Doe has let you the property on condition that you may use it for a private dwelling-house only, he might then obtain an injunction against you and against Richard Roe for an infringement of the covenant. Richard Roe might, in his turn, claim damages against you for breach of the covenant which allowed him to use the premises as a billiard saloon. A covenant as to user—*i.e.*, as to the purposes for which the premises may be used—is usually inserted in every lease.

A lease should define the liability of the parties in the event of destruction of the premises by fire. When a lease

contains full repairing covenants it is usual for the lessee to undertake the liability to insure against fire risks.

Most of the obligations in a lease are obligations by the tenant. The landlord is letting property which belongs to him, and he lays down the conditions on which he will do so. There is one obligation which is, however, always imposed on the landlord. He must covenant to give his tenant a legal right called 'quiet enjoyment' of the property. 'Quiet' enjoyment means undisturbed possession. It is not an antithesis to 'noisy'. It means that the tenant must not be disturbed in his occupation by the landlord, or anyone claiming through the landlord, so long as he observes all the conditions of the lease. It is no guarantee against disturbance by a superior landlord, if the landlord should fail to carry out his obligations under the head lease. Although the tenant may, in such a case, have a claim for damages, for what it is worth, against his landlord, he will have no remedy against the superior landlord. Moreover, the covenant will not give a tenant a claim against the landlord if there is interference by a stranger, over whom the landlord has no control, as he is only responsible for all acts which he is in a position to control. For example, if the landlord owns adjoining houses separated by a partition, and he lets one to John Doe for residential purposes and later lets the other to Richard Roe for use as a factory for processing rabbit-skins, John Doe might have a legal cause of action against his landlord if the skins were to emit unpleasant odours. It would be a breach of the covenant for quiet possession, and would be additional to any remedy which the tenant might have against the factory owner for nuisance, a subject dealt with in Chapter 14.

When a lessee, under a lease for a term of years, remains in occupation of the premises, with the lessor's consent, after the lease has expired, the law will usually deem the continued tenancy to be an annual tenancy. The significance of this is that an annual tenancy, without provision as to notice, can only be terminated by six months notice to quit given to expire on the anniversary of the date when the term commenced.

In the case of a monthly or weekly tenancy however, the law usually regards the tenancy as running from month to month or from week to week as the case may be. In such circumstances, a month's or a week's notice to quit is necessary. There are special rules which relate to agricultural tenancies designed to prevent a farmer from being evicted after he has his crops in the ground, and before they are ready to harvest. Twelve months' notice is the minimum notice in such a case. A notice to quit is a very technical document, and it is null and void if it does not give the tenant the proper notice required by the law or by the agreement between the parties, as the case may be. If, however, a landlord wants possession of his premises on the date when the lease or tenancy agreement expires, no notice to quit is normally necessary, although the landlord must be careful, in such a case, not to accept rent for a further period. Except when the premises are controlled under the provisions of the Rent Acts, a fresh tenancy is usually created if rent is accepted for a period after the term has expired.

'Fixtures and fittings' are dealt with in Chapter 18. It should be observed here, however, that if a fixture is brought on to the premises by a tenant, or if an improvement is made by him during the course of the tenancy, it becomes part of the property. It cannot be removed by the tenant at the end of the tenancy. The landlord is entitled to receive back his property with all additions and improvements. Except in the case of trade and agricultural fixtures and improvements, the tenant is not even entitled to compensation. If he wishes to claim compensation he must come to an agreement with his landlord before he installs the fixture or makes the improvement. If he does not do so he has no remedy.

A lease of premises is usually executed in duplicate. One copy, signed by the landlord, is delivered to the tenant, and the other copy, called the counterpart, is signed by the tenant and retained by the landlord, as evidence of the obligations which the tenant has undertaken to observe. The lease must be stamped with an *ad valorem* impressed stamp of 1% of the annual rent, but the counterpart requires only a 5s.

impressed stamp. In addition to the lessee's liability for his own legal costs, there is a custom in London and many parts of the country under which the lessee has to pay the landlord's legal costs and stamp duty as well as his own. A specimen scale of charges is set out at the end of Chapter 32.

When a landlord alleges there has been a breach by the tenant of any covenant, and there is a 'forfeiture' clause in the lease—*i.e.*, a clause which gives the landlord the right to forfeit the lease for a breach of covenant—the landlord is not entitled to exercise this right arbitrarily. He must first serve the tenant with a written notice specifying the breach and requiring it to be remedied, and he is also entitled to require payment of reasonable compensation. If the tenant fails to comply with the terms of the notice within a reasonable period, the landlord may then take proceedings to forfeit the lease, and also for payment of compensation. If, however, the covenant which has been broken is the covenant to repair, the law refuses to allow compensation to the landlord in excess of what is called the damage to the 'reversion', meaning, in effect, the actual damage which the landlord will suffer by reason of the failure to repair. If it is proved by the tenant that the premises are to be demolished or reconstructed at the end of the term, and the landlord has no intention of reinstating them to their original condition, the landlord will not be able to recover, as compensation, the imaginary sum which he might have spent on imaginary repairs.

The Court has extensive powers of granting 'relief' to a tenant when forfeiture proceedings are taken. For example, if proceedings are taken in respect of a default in payment of rent, and the tenant asks for 'relief', it is the practice of the Court to make an order relieving the tenant from the penalty of forfeiting the lease upon payment by him of the arrears of rent and all costs incurred by the landlord. Similar relief may be given in the case of the breach of other covenants, with the exception of the breach of a covenant against assignment or under-letting.

The landlord has other remedies available to him for non-

payment of rent. War legislation, not yet repealed, does not permit him at present to enforce these rights without the leave of the Court, but in normal times he may levy a distress or 'put in the brokers', as it is usually called. The brokers may seize everything on the premises except the instruments of a man's trade, or his or his family's wearing apparel to a value of £5. If the effects of a lodger or under-tenant are seized, they may, however, be reclaimed under certain conditions. For example, if you are Richard Roe's lodger and your goods are seized to satisfy rent due from Richard Roe to his landlord John Doe, you may serve a notice on John Doe giving him particulars of your claim, and thereupon, upon payment by you to John Doe of any rent owing from you to Richard Roe, your effects must be released. Articles seized under a distress may be sold at the expiration of fifteen days, unless the arrears of rent are discharged within that period.

If you take a lease of premises, you can never rid yourself of your liability to the landlord for the breach of any condition or covenant in the lease unless you are expressly released by deed. You still remain liable under your covenant even after you have assigned your interest in the lease. Assume, for example, that in 1931 John Doe took a full repairing lease of certain premises for a term of fourteen years, and in 1938 he assigned the residue of the term, with the consent of his lessor, to Richard Roe. In 1942 Richard Roe became insolvent and disappeared. When the lease expired in 1945, John Doe received notice from the lessor that the rent was three years in arrears, and the premises were in a state of dilapidation, and he required John Doe to carry out his obligation to pay the rent, and also to pay as damages the sum required to put the premises in repair in accordance with the covenant in the lease. In such a case the licence or consent which John Doe received permitting him to assign the premises does not relieve him of his obligations. Such a licence or consent is merely a permission given to him to assign his term to Richard Roe. There will be nothing in the document to suggest that he is himself

to be released from any past or future liability. Indeed, the licence may even include an express condition that it is granted without prejudice to the lessee's continuing obligations under his covenants.

A tenant's only safeguard against a contingent risk of this character is to assign his interest in the lease to a man of undoubted financial status. As the assignment carries with it a legal obligation by the assignee to be responsible for the covenants in the lease, and to indemnify the assignor against all claims made by the lessor, the lessee is able to pursue his claim for indemnity against the assignee, so long as the latter is solvent.

Richard Roe, the assignee, may, of course, himself re-assign the premises to a second assignee, subject to his landlord's consent, when required. If he does so, Richard Roe normally ceases to be under any further obligation to the lessor. He has never entered into any agreement with him and has never had a direct covenant with him. The only document Richard Roe has signed is the deed by which John Doe assigned the lease to him. Richard Roe's obligations to the lessor, by virtue of that assignment, are to observe the covenants of the lease so long, and only so long, as he himself retains an interest in the land. On the other hand, he remains liable to John Doe because of his obligation to indemnify him for the full term of the lease, since the assignment imposes this obligation.

The practical effect of these rather complicated transactions is that : (1) the lessor may always sue for a breach of covenant in the lease either (a) the original lessee, or (b) the person in actual occupation of the land at the time of the breach ; (2) the original lessee may sue the first assignee for damages for breach of his covenant to indemnify, and (3) the first assignee may sue the second assignee in respect of the latter's covenant to indemnify. If the second assignee, in his turn, has re-assigned the lease to a third assignee, he may similarly pass on to the latter any claim which is made against him, and so on, however long the chain of assignees. As a general rule, even the death of a lessee or an assignee will not affect

the liability, which will fall on the estate of the dead man. At the end of a term of ninety-nine years, however, it may be impossible to trace some assignee, where indemnity has become enforceable by a prior assignee (or the original lessee) and the chain will then be broken. It follows in such an event that someone may be 'stung' for the cost of repairing a property with which he has parted many years earlier.

You should, accordingly, never sign a lease without consideration of your potential liability, and unless you feel sure you are justified in accepting a responsibility which will continue for the full term of the lease.

the rent which may be charged in each of these two classes. Pre-1939 premises include houses which (1) had previously had a rateable value not exceeding £35 in London or Scotland, and £20 elsewhere, (2) had not been decontrolled under the provisions of earlier Rent Acts, (3) had been built before April 2nd, 1919, and (4) had not been converted since that date into two or more separate flats or tenements.

The rent which may be charged in respect of pre-1939 premises is a rent known as the 'standard rent', together with certain percentage additions. The same percentage additions may not, however, be charged in respect of 1939 premises.

Standard rent in respect of pre-1939 premises means the rent at which the house was let on August 3rd, 1914, or, if the house was not let on that date, the rent at which it was last previously let before that date, or if it had never previously been let, then the rent at which it was first let. September 1st, 1939, must be substituted for August 3rd, 1914, as the date upon which the same calculations are to be based in order to arrive at the standard rent of 1939 premises.

Although the rateable value is the criterion for deciding whether or not premises are controlled premises, the standard rent is not based upon the rateable value. It has no relation to it, except in the few cases in which the standard rent is less than the rateable value. In that event, the amount of the rateable value is substituted for what would otherwise be the standard rent, and the rateable value becomes the standard rent.

If the payment of rent includes bona-fide payments in respect of board, attendance or use of furniture, the property is *not* controlled. These payments must, however, be really genuine and substantial. A landlord cannot escape the provisions of the Acts by including two wooden chairs in the letting, and calling it a furnished letting. If you are in occupation of premises controlled by the Acts, and you let furnished part of the premises, or even a single room, that part of the premises may no longer be controlled. Although, however, property which is let furnished ceases to

be controlled, there is still a limit imposed by the Acts as to the amount of rent which may be charged. If a landlord lets rooms, furnished, which would be controlled if unfurnished, he is not entitled to charge rent which gives him an excessive profit. Moreover, *extortionate*, as distinct from *excessive*, charges for furnished lettings are made a criminal offence. An excessive profit is one which is more than 25% in excess of the 'normal profit' in the case of pre-1939 property, or any sum exceeding the normal profit in the case of 1939 property. 'Normal profit' is the profit which might reasonably have been expected from a similar letting on September 1st, 1939. To decide whether or not a charge is extortionate, regard must be given to all the circumstances of the case, and, in particular, the margin of profit allowed by the Acts in their definition of normal profit.

The landlord of pre-1939 controlled premises is entitled, subject to certain conditions, to charge an increase over the standard rent of 6% of his expenditure after August 1914, and 8% after 1920, in respect of improvements or structural alterations, or improved fixtures or fittings, as distinct from repairs. In the case of 1939 premises, the permitted increase is 8% on the same type of expenditure since September 1939. The landlord may also, in every case, charge an amount corresponding from time to time to the increase in rates which he may be required to pay. In the case of pre-1939 premises the landlord is also entitled to make the following increases: (a) an increase of 15% over the standard rent; (b) an increase of 5% or 10%, if the premises have been sublet by his tenant in specified cases and (c) an increase up to 25% in cases in which the landlord is liable for repairs, according to the extent of such liability. Increases (a), (b) and (c) are not, however, allowed in respect of 1939 premises.

These examples will help to clarify the position.

(1) You are renting pre-1939 premises which were let on August 3rd, 1914, for £80 a year. The standard rent is £80, and the rent which you may be asked to pay is accordingly £80 + 6% of any sum spent by the landlord since 1914 and 8% since 1920, on improvements (as previously described) +

an amount corresponding to the increase in rates on the net rent if these were being paid by the landlord on August 3rd, 1914 + 15% + a percentage not exceeding 25%, if the landlord is responsible for repairs.

(2) You are renting 1939 premises which were let on September 1st, 1939, at £80 a year. The standard rent is £80, and although you may be asked to pay the additional 8%, and any increase in rates, you cannot be asked to pay either the 15% addition or the repairs increase.

When you enter into occupation of property under a tenancy agreement, the agreement defines the terms of the bargain made between the landlord and yourself. When your agreement expires, you are normally expected to vacate the property in accordance with your covenant, and if you fail to do so you may be liable to pay double rent, whilst the landlord may speedily obtain an order from the Court for possession of the property. When, however, the tenancy agreement relates to controlled premises, a different situation arises. A tenant of controlled premises may refuse to vacate premises at the end of his term, and if he decides to remain in occupation, he is known as a 'statutory tenant' holding under a 'statutory tenancy'. A statutory tenancy, however, never comes into existence until *after* the tenancy agreement has expired. If a tenant is in occupation of premises under a written or verbal agreement, the Acts, except as to the maximum rent which may be charged, have no application, so long as the agreement remains in force. The landlord is not entitled to break the agreement in order to raise the rent by any permitted increase. The increase may be imposed only *after* the agreement has been terminated either by a proper notice to quit, or by expiration of the term.

If a tenant remains in occupation of premises, as a statutory tenant, after his agreement has expired, the obligations of the tenancy agreement remain binding both on the landlord and the tenant, but the Acts protect the tenant from his obligation to vacate the premises, and the landlord, generally speaking, cannot obtain possession. This protec-

tion normally extends to members of the tenant's family, even after the death of the tenant, provided they have lived with him for six months prior to his decease. The suppression of the landlord's right to possession of his property on the termination of a tenancy agreement was a unique new feature of the law when the first Rent Act was passed in 1914.

There are, however, some occasions on which a landlord may obtain an order from the Court for possession of controlled premises. Where proceedings are taken by a landlord against his tenant, and the Court is asked to make an order for possession, the first question it must consider is whether or not it is reasonable to make the order. To enable it to decide this question, the Judge must take into consideration every relevant factor. He must listen to every point argued both by the landlord and by the tenant, and he must then decide the question without being influenced by prejudice, or sentiment, for or against either party. Even, however, if the Judge considers it reasonable to make an order, he is not entitled to do so, unless he is also satisfied, either that suitable alternative accommodation is available for the tenant, or, alternatively, that one of a number of other conditions is applicable. Suitable alternative accommodation cannot be defined in a word, but the following points have to be considered: (1) it must consist of premises of similar character which will, in the opinion of the Court, give the tenant security of occupation reasonably equivalent to that which he already enjoys; (2) it must be reasonably suitable to the needs of the tenant and his family, as regards proximity to place of work; (3) it must be either similar, as regards rental and accommodation, in comparison with other premises in the neighbourhood, occupied by those whose needs are similar to those of the tenant and his family, or otherwise be reasonably suitable to the means and needs of the tenant and his family, as regards extent and character. These provisions mean, in effect, that the Court must take every factor into consideration and apply the key word of 'common sense'.

If no suitable alternative accommodation is available, the circumstances in which the Court may make an order for

possession include the following : (1) if the rent is in arrear, or if the tenant has broken some other obligation imposed on him by the tenancy. For example, an order for possession might be made under this heading if the tenant had agreed, by the terms of his tenancy, not to keep animals on the premises, but nevertheless insisted upon doing so. (2) If the tenant has been guilty of conduct which is a nuisance or annoyance to adjoining occupiers, or if he has been convicted for allowing the premises to be used for illegal or immoral purposes, or if he has allowed the condition of the premises to deteriorate by his neglect. If, however, the deterioration is due to the act of a lodger, or sub-tenant, the Court must be satisfied, before making an order for possession, that the tenant is in some measure responsible for the default, by his personal failure to take steps to dispossess the lodger or sub-tenant. (3) If the tenant, after giving notice to quit, has refused to leave, and in consequence of the notice the landlord has either agreed to sell or let the premises with vacant possession, or has undertaken an obligation which he will be unable to carry out unless he obtains possession. (4) If there has been either a sub-letting, or, in certain circumstances, an assignment, without the landlord's consent, and, in this connection, the Court may also make an order for possession, if it considers it reasonable to do so, when the tenant has sublet part of the premises at an excessive rent. (5) If the premises are reasonably required by the landlord for occupation as a residence for one of his employees under certain specified conditions. (6) If the premises, being pre-1939 premises acquired by the landlord before December 6th, 1937, or 1939 premises acquired by him before September 1st, 1939, are reasonably required by the landlord for occupation by himself, or for specified members of his family. In this last instance the tenant must, in addition, satisfy the Judge that he will suffer greater hardship if the Judge makes an order for possession, so that he has to vacate the premises, than the hardship suffered by the landlord if the order is refused.

If you consider these points dispassionately, you will

appreciate that whilst there are many cases in which the Courts have power to order possession, a tenant is in a position of considerable privilege. If he pays his rent punctually, and is exemplary in his behaviour as a tenant, and if the Court is satisfied that no suitable alternative accommodation is available, he will be able, in a large number of cases, to remain in occupation. The decision of the Judge is final, and if he refuses to make an order for possession after giving proper consideration to the facts, the landlord, generally speaking, has no remedy.

The landlord is not entitled to include terms in a tenancy agreement which exclude the provisions of the Rent Acts, and evasion or attempted evasion of the Acts either by landlord or tenant may be punished by penalties. For example, a landlord is not entitled to get round the Acts by asking for a payment of a premium as a condition for granting or continuing a tenancy. A demand for an exorbitant sum for furniture may be regarded, under the Acts, as a demand for a prohibited premium. The tenant, for his part, is not allowed to demand a premium from a sub-tenant as a condition for letting him into possession, but this, of course, applies only to a statutory tenancy. Any tenant may normally demand payment of a premium when he assigns his interest in a lease or tenancy agreement to a third person, unless there is anything in the agreement which prohibits or limits the right of assignment. You will also recollect that assignment or under-letting of a statutory tenancy, without the consent of the landlord, is a ground for making an order for possession, since the statutory tenancy is designed for the personal protection of the tenant. On the other hand, an authorised assignment or sub-tenancy by the tenant, *during* the currency of his tenancy agreement, and *before* the statutory tenancy arises, will protect the assignee or sub-tenant when the tenancy expires, and, generally speaking, he will be entitled to the same protection as a tenant.

If a tenant is in doubt as to whether or not he is paying an excessive rent, he should take steps to ascertain the standard rent. This should appear in his rent book, and if it

is not there, he is entitled to demand the information from his landlord. If it is not supplied within fourteen days, the landlord commits an offence punishable by a fine. To state the correct amount of the standard rent of a single room, being part of other premises, is often a difficult problem. When the standard rent has not already been ascertained, it must be fixed by the Court as a fair proportion of the standard rent of the whole of the premises of which it forms part. If rent in excess of the standard rent has been paid, excess payments made over a maximum period of two years may normally be recovered, either by legal proceedings, or by deduction from current rent as it falls due.

In the next chapter we shall be dealing with the subject of mortgages. It may be observed here that the Rent Acts also contain provisions to protect a certain class of mortgagor—*i.e.*, a person who has borrowed money on the security of property. These provisions restrict the right of the mortgagee—*i.e.*, the person who has lent the money—to take possession of controlled premises, and also restrict the rate of interest which the mortgagee is entitled to charge.

The Rent Acts have given landlords many heartaches and headaches. Some of their grievances are now academic, for a landlord can no longer claim that restricted rents discourage the building of houses. There is no indication, in the present acute housing situation, that builders are reluctant to avail themselves of the limited facilities available for private building. There is, however, evidence that the protection afforded to the tenants by the Acts may be abused. Some tenants, undoubtedly, make an unreasonable profit by subletting the premises furnished, and there is insufficient allowance made to landlords for the extra costs of repairs. There are, indeed, many cases in which a tenant is living at his landlord's expense, and there is substance in the argument that if a tenant is to be subsidised, it should be done at the expense of the community and not the individual landlord. On the other hand, tenants frequently say it is a waste of breath to commiserate with landlords, for they endeavour to evade the

provisions of the Rent Act whenever opportunity arises, and some tenants adopt the popular argument of a past that is dead, by contending that landlords are always grasping and unscrupulous.

The truth, as usual, will probably be found half-way between these two points of view. There are both good and bad landlords, and there are both good and bad tenants. Good tenants will not deny that they hold a privileged position under the Rent Acts, and will not abuse their rights, for whilst the Court of Appeal has declared that the Rent Acts are for the protection of tenants and not for the penalisation of landlords, the protection of tenants must, inevitably, frequently result in such penalisation.

SALE AND PURCHASE OF PROPERTY AND MORTGAGES

‘O Lord, thou knowest that I have nine houses in the City of London, and that I have lately purchased an Estate in fee simple in Essex. I beseech Thee to preserve the two counties of Middlesex and Essex from fires and earthquakes.’

Prayer of John Ward, M.P., 1727, quoted in Hine’s *Uncommon Attorney*.

SOME of the essential features of a contract for the sale and purchase of ‘property’, the term used in this chapter for land with the house which stands on it, were considered in Chapter 2. In such a transaction you do not, from the legal aspect, primarily purchase a house. You purchase the land, either as your absolute property, when you call it a ‘freehold’ (sometimes described as an Estate in Fee Simple), or you acquire it for a limited number of years, as described in Chapter 16, when it is known as a ‘leasehold’.

When you buy or sell property, it is not the same thing as when you buy or sell a piano. You identify the piano, you pay or are paid the purchase price, and it is then delivered. This completes the transaction. On the other hand, when you buy or sell property you cannot hand it over in the same way as a piano. The ownership of the property is identified, not by the bricks and mortar with which the house has been built, but by the title-deeds or documents which legally constitute the right of ownership or title to the land. Without possession of such deeds you have, generally speaking, no legal title to the property.

The preparation of a contract to sell property involves a number of legal considerations. For this reason, when property is sold through an estate agent the latter should always insert the words ‘subject to a contract to be prepared by the vendor’s solicitors’ when he gives a receipt for a deposit. Although this means that neither party is bound to proceed with the transaction, since the receipt merely records an

agreement to make an agreement, it is essential from the point of view of the vendor. If the estate agent omits these words, or words of similar import, and enters into a binding contract on behalf of the vendor, the contract is described as being an 'open contract', and under an open contract the vendor must assume a number of legal obligations with which he may not be able to comply. He will then find himself committed to sell the property on conditions which do not exist. For example, there is legally an implication in an agreement for the sale of property that there are no restrictions as to the use which may be made of the property. When you buy a piano, it is not sold with the restriction that it may not be played for professional purposes. A house on a residential housing estate may, however, be sold with a restriction, for the mutual benefit of all the owners of houses on the estate, that no business is to be carried on on the premises, and that it is to be used for private purposes only. The owner of property held subject to a restrictive covenant may be restrained by the High Court if he commits an infringement. It is therefore imperative to disclose it to a prospective purchaser, before entering into a contract to sell, for if it is not disclosed, the seller may be sued by the purchaser for damages, or the latter may have the right to rescind the contract.

It is usually as unwise for a purchaser, as it is for a vendor, to enter into a binding contract through an estate agent when he wishes to purchase property. If you have set your mind on a house, it may be disappointing not to be able to clinch the deal when you pay the deposit. You should, however, never commit yourself to the purchase of property until certain preliminary enquiries have been made, and until it has been surveyed on your behalf by a qualified surveyor. Although the vendor must disclose any restrictive covenants or limitations contained in the title-deeds, he is not under any responsibility as to the structural condition of the premises. You must take the house as you find it, and you must also ascertain for yourself if it has been scheduled for some special purpose in a Town Planning Scheme, or if there

are any sanitary or other notices which have been served by the Local Authority, with which you may have to comply. Moreover, only a surveyor will be able to tell you if the drains are in a good or in a bad state, or if there is any sign of dry rot on the premises. It will be too late to make these investigations after you have signed the contract to purchase, for although the reports may prove unsatisfactory, you are not entitled to rescind the agreement.

Fixtures and fittings may also be conveniently dealt with in the contract. It is sometimes necessary to distinguish between landlords' fixtures and tenants' (or trade) fixtures. Generally speaking, anything which is affixed to the premises, and cannot be removed without damaging the structure, such as a mantelpiece or a bath, is a fixture, and anything of a movable character, such as an electric-light bulb or a pendant, is a fitting. A fixture, being part of the structure of the premises, is usually deemed to be included in the purchase. Fittings, however, are excluded from a sale unless expressly included in the contract, although the contract frequently provides for the sale of the fittings at a valuation.

When you have entered into a binding agreement to purchase property—*i.e.*, as soon as the contracts are exchanged between yourself and the vendor—the property is said to belong to you 'in equity'. This means, in effect, that it is your responsibility. If it is destroyed by fire before the sale is completed, the loss usually falls on your shoulders, and it does not relieve you from your liability to pay the balance of the purchase money on the agreed date. In practice, property is usually insured against loss by fire, and it is necessary for the purchaser to notify the insurance company of his equitable right to the property, or to insure independently, as soon as the contracts have been exchanged.

There has been considerable simplification in the transfer or conveyance of property since the passing of the Land Transfer Act 1897, which provided for the compulsory registration of land titles in London and certain other parts of the country. When property has a registered title, it is recorded in the official registers at the Land Registry in London.

The entry of a particular property on the Register may involve little difficulty when the title is free of complication, but, unfortunately, the history of English land law is of a most involved character. It would be useless to attempt to embark upon any explanation in a work of this kind, and it would be unreasonable to expect a layman to evince any interest in the subject. The procedure has been substantially simplified since a series of Acts, shortly called the Law of Property Acts 1925, and we must content ourselves with observing that 'hangovers' of the past have left great obstacles to registration in country areas, where the land has not been split up into the comparatively simple 'parcels' which now characterise properties in built-up areas.

After the exchange of contracts there are certain formalities which are incidental to every sale and purchase. The vendor's solicitors must prepare a document called an 'abstract of title', which consists of a precis of the deeds and events which are relevant to the vendor's title to the property. This abstract must be examined by the purchaser's solicitors, and they must check its contents with the original title-deeds. The purchaser's solicitors will also be required to raise queries called 'Requisitions on Title', which examination of the deeds and documents necessitate, and these requisitions must be answered by the vendor's solicitors. These matters are bound to take time, but when the formalities have been settled, the purchase of the property can be completed—*i.e.*, the title-deeds are handed over, with a formal deed of conveyance or transfer to the purchaser, in exchange for the purchase price. It is not the practice to pay the purchase money by cheque, but always in cash or by banker's draft. A banker's draft is a cheque drawn by a banker, and is therefore regarded as being the equivalent of cash, since it will never be dishonoured on presentation. Apart from the risk of dishonour of a cheque, there is always the possibility of the death of the drawer before the cheque has been paid by the Bank. Death revokes the authority of a Bank to pay a customer's cheque, and the vendor might, therefore, be deprived of his money for weeks, or even months, until the

legal formalities described in Chapter 27 give the deceased purchaser's personal representatives the right to deal with his affairs.

In the absence of a stipulation to the contrary, the vendor is bound to complete the purchase, even if the property has been requisitioned after the exchange of contracts.

When you buy property, you may not always have available the whole of the money necessary to pay for it. You may raise part of the money on mortgage, or borrow it from a Building Society. It is their business to lend money, on the security of the title-deeds of property, at interest of 4% to 5%. As security for the advance the society will hold the title-deeds, and the borrower, or 'mortgagor' as he is called, will sign a deed, called a 'mortgage', which binds him to repay the debt to the society, called the 'mortgagee', by monthly or quarterly instalments over a period of years. The amount of each instalment is calculated to include a certain proportion in respect of capital, and a certain proportion in respect of interest. It is frequently a convenient way in which to pay for a house, and it results in every payment made being a payment towards the purchase price. Unlike rent, which is expended without return, every payment made is a form of saving. It has, however, its disadvantages. It may well be satisfactory so long as the mortgagor is in employment, and is able to keep up his instalments, but if he becomes unemployed his prospects may become grim.

Although, as a general rule, a Building Society mortgage contains provisions which do not allow the society to require repayment of the debt so long as the instalments are paid punctually, it will also contain other provisions which give the society extensive powers to enable it to obtain repayment of the advance, and also a right to possession of the property, if the instalments are not kept up to date. Most Building Societies are reasonably sympathetic with misfortune, but they are in business to make a profit, and are not charitable institutions. If a mortgagor does not pay his instalments, the society will sooner or later apply to the Court for leave to enforce its rights. The society may, for example,

sue for possession of the property or for repayment of its money, or it may take proceedings, called 'foreclosure proceedings', the effect of which is to dispossess the borrower of any further interest in the property. Alternatively, if the property has been let by the borrower, the society may appoint a receiver who will receive the rents and profits of the letting. These are only some of the powers, but the exercise of any of them is bound to be unfortunate for the mortgagor.

As an alternative to borrowing money from a Building Society, it is usually possible (in the case of a freehold or long leasehold property) to obtain a mortgage of a sum equivalent to one-half to two-thirds of the normal value, but not necessarily of the inflated value, of the property. The mortgagee will probably be a private investor who requires a long-term investment. He may expect interest of about 5% on the amount which he advances, but, unlike a Building Society mortgage, he will not ordinarily require repayment of his capital by small instalments each month or each quarter. He will, however, retain the right to ask for repayment of the entire advance at any time at three months' notice, and the mortgagor, on his part, will have the right to repay the loan at any time on six months' notice. When a mortgagee requires repayment of his money, it is usually possible to arrange for a transfer of the mortgage, although this may involve substantial expense.

If the mortgagor fails to repay a mortgage after he has received due notice, the mortgagee may take steps to enforce his rights in the same manner as a Building Society. In every instance, however, the mortgagor has the right to redeem the mortgage—*i.e.*, to repay his indebtedness—at any time before a sale or foreclosure. American films may portray the villain foreclosing on the innocent mortgagor at twenty-four hours' notice, but enforcement of legal rights under a mortgage in England cannot be effected overnight, and it frequently involves protracted Court proceedings.

A mortgage debt is a personal debt. The property is security for the debt, and is not a substitute for it. If the

property is destroyed by fire the mortgage debt must still be repaid. It also remains a liability on the death of a mortgagor, and if you have mortgaged the house in which you are living, and you wish your wife to enjoy the property after your death, free of the mortgage liability, you should take out a life insurance policy, for a sum which will be sufficient to discharge the mortgage.

The provisions of the Rent Acts, so far as they relate to mortgages, mitigate certain hardships which arise when a mortgagor of small property cannot pay the principal or interest, and the Court has extensive powers of protecting him in proper cases. They are analogous in character to those given to the tenant by the Rent Acts.

A word of caution is required for the benefit of any would-be house purchaser who is offered the bait of a 'Free Conveyance'. Between the wars a number of purchasers were unfortunately caught in this trap. In some instances, builders had mortgaged the land on which the houses had been built, and when they handed out the 'Free Conveyance', they did not arrange for the land which had been purchased to be released from the mortgage. In cases in which the builders subsequently failed in their enterprise, and were made bankrupt, the house owner then learnt that his property was subject to a mortgage, and he had no redress against the bankrupt vendor. No purchaser of a house should be so imprudent as to dispense with legal assistance. If he does so, he must blame himself, and not the law, if he is had for a 'mug'.

Some of the possible consequences of borrowing money on mortgage may appear harsh. When, however, John Doe has borrowed money from Richard Roe, the latter has always been entitled to stipulate the conditions of the loan. In the course of years, many of these conditions have become stereotyped. John Doe will now have to accept them or go without the money. If you feel disposed to criticise this practice you should consider if you yourself would be willing to lend money to a stranger, unless you were permitted to dictate the terms of the loan. Moreover, if the borrower

defaulted, you should ask yourself if you would not expect the law to assist you in recovering payment of your money. The law has, in fact, done much to temper justice with mercy by the enactment of legislation designed for the protection of the 'small man', and it is a mistake to think that in its day-to-day operations the law is uninterested in the poor, and will only work its machine for the benefit of the wealthy. Poor men used formerly to tremble before the Majesty of the Law. It is now no longer necessary for them to do so, for even lawyers sometimes have democratic instincts. It is, however, unrealistic to pretend that the community would benefit from a system which permitted a borrower to dictate the terms on which he was to obtain his loan. There are still too many rogues in circulation to render such a scheme workable. It is not only capitalists who are greedy, and even capitalists are not always greedy.

COMPANIES

'Did you ever expect a Corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?'

Wilberforce—*Life of Thurlow*

WHEN an association of persons is formed for the purpose of sharing profits it usually carries on its business either as a partnership or a Company. Partnerships were dealt with in Chapter 7 and the word 'Company' is used by lawyers as a convenient term for one type of corporation. A Company is a legal entity constituted by laws which define and limit its rights. It has a life cycle starting with incorporation, or birth, and ending in dissolution, which is equivalent to death. Unless it is dissolved, however, it continues its existence indefinitely, subject to the power to remove a Company from the register of 'live' Companies if it has become moribund. There is also a process called 'liquidation', which precedes dissolution and is a death-bed sort of affair.

There are several types of Companies or Corporations—for example, Chartered Companies, that is to say Companies which are constituted by a Royal Charter, such as the Law Society, the Institute of Chartered Accountants and certain Borough Councils; there are also Companies which have been constituted by special private Acts of Parliament—for example the Railway Companies; there are even cases of ancient Companies which have operated as Corporations for so long that no one can say with certainty how or by what authority they were formed, and they are known as 'prescriptive Companies'. Examples of the latter type (which are extremely rare) operate certain rights of fisheries.

The vast majority of Companies are Limited Liability Companies, which have been formed under the general authority of the various Companies Acts passed since 1862, and the word 'Company' as used throughout this and the next chapter means a Company formed under the general

authority of the Companies Acts, in which the shareholders have limited their liability to the nominal or face value of their shares.

You will recall that the owner or owners of a business organised and operated by a firm or partnership are individually responsible for the debts of the firm. There is no limit whatever to their liability. If the firm is insolvent the owner or each of the partners may be made personally liable for the debts, and if they are not paid in full, each partner may be made bankrupt. From the commercial point of view, perhaps, the most essential distinction between a firm and a Company is the immunity enjoyed by the owners of a Company to pay debts incurred by the Company. If a Company fails to meet its liabilities, the owners of the Company—namely, the shareholders who own the capital employed in the Company—are only liable to pay to the Company the nominal value of the shares held by them, if such shares have not already been paid up. They are not liable for the debts of the Company. Those in charge of its affairs, called its directors, also incur no legal liability for any of the debts, unless they have committed some breach of their duty in their conduct of the business.

The Companies with which we are concerned in this chapter are divided into two main classes—viz., Public Companies and Private Companies. A Public Company has the right, under certain conditions, to invite the public to subscribe for its shares. Public Companies often apply to a stock exchange to allow dealings in their shares, but permission is only given to Companies which can satisfy the Stock Exchange Regulations designed to secure certain safeguards for investors. The majority of Companies, however, are Private Companies. A Private Company, as is implied by the name, is not entitled to invite the public either to subscribe for its shares, or to grant it a loan, and the number of shareholders in a Private Company (other than employees of the Company) is limited to fifty.

The right to nominate the directors—*i.e.*, the persons who direct the policy of a Company—is usually vested in the

persons who have subscribed to the Company's capital by purchasing shares. A business with assets valued at £1,000 might be owned by a Company incorporated or formed with a capital of £1,000. This capital might, theoretically, have been subscribed by 1,000 persons each of whom had contributed £1. In such a case there would be 1,000 shareholders each of whom would hold one share of £1. In practice, you do not meet with a combination of this character. The capital of a small Company is usually subscribed by two or three shareholders only. They decide to undertake and operate a specific business, and they promote a Company for the purpose. When the signatory or original shareholders have incorporated the Company, they meet together and appoint the directors who will conduct the Company's business operations. Individually a shareholder has few powers, beyond the power to vote. The conduct of the business of the Company rests entirely in the hands of the directors, and when the term of office of any director has expired, the shareholders may either re-elect him, or appoint another director in his place. Shareholders have the privilege of attending at general meetings of the Company, and one such meeting must be held at least once in each calendar year. Their participation in the affairs of the Company usually begins and ends with these meetings.

It is not possible to particularise the rights of shareholders with any exactness. They vary with each particular Company, for they are contained in the contract made between the Company and each of its shareholders. This contract is contained in a document, considered later in this chapter, called the Articles of Association of the Company. The generalisations in this chapter on the rights of shareholders are, accordingly, based on the rights which are given to them, as a general rule, by the Articles of Association of the Company. It must not be assumed that they apply in any particular case, for the only way in which you are able to ascertain the rights of the individual shareholder in any particular Company is to examine the Articles of Association of that Company.

When you hold shares in a Company, you are not entitled, as a rule, to demand repayment of your money. You are not a creditor of the Company. You are one of its members, and if you wish to dispose of your shares, and obtain repayment of your money, you are only able to do so if you find someone who is willing to purchase your shares, and, in the case of many private companies, if the directors are also willing to accept the purchaser of the shares as a member of the Company in your place.

The promotion of a Private Company to operate a business is an everyday occurrence, for to own a business and at the same time to limit your liability is, often, a convenient procedure for regulating your affairs. You may decide to risk a certain amount of money, and no more, in the venture. If you fail to achieve your object, you may cut your loss and start with a fresh venture. If John Doe wishes to start a business, he may promote a Company, hold all but one of the shares, and arrange for his wife, or an employee, to hold the remaining share. His wife, or his employee, will, in such circumstances, be his nominee. When the nominee takes his share, he may, at the same time, execute a transfer of the share in blank, and hand it to John Doe with his share certificate. If at a later date John Doe wishes to part company with his nominee he may make use of the transfer, and re-issue the nominee share to a new shareholder. In this way John Doe retains a 100% control of the Company. This type of business is called a 'one-man Company'. Although it is lawful and legitimate, it may not inspire customers to give the Company credit, when the Company makes a purchase of goods.

The great advantage given by the law to a man who conducts his business with limited risk necessitates safeguards for those who have business transactions with the Company. It is, for instance, essential they should know they are dealing with a Company. If Richard Roe did not know that John Doe was operating a business as a Company, and was not personally liable for the debts of the business, it would result in great injustice, for John Doe might obtain goods on credit, leaving Richard Roe to ascertain that he was

dealing with a Company only after he had endeavoured unsuccessfully to recover payment of his debt.

To meet this situation, the law requires every Company which is incorporated with a view to carrying on business for profit, to have the word 'Limited' or 'Ltd.' as the last word of its title. When it is not formed for the purposes of gain, the word 'limited' may be omitted from the title, if sanction is obtained from the Board of Trade. If John Doe is using his own name for trading purposes, but his business is, in fact, owned by 'John Doe Limited', he must make this fact clear to the world. The name, with the addition of the word 'Limited' or 'Ltd.', must appear on all documents which relate to the business. If this is not done, it renders John Doe liable to penalties as well as making him personally responsible to anyone who has given credit, without notice of the business being owned by a Company. Conversely, it is an offence to describe a business as being 'limited' when it is not, in fact, registered as a limited liability Company.

The addition of the word 'limited' to the title of the Company is not the only protection given to the public. Every Company formed or incorporated since the Registration of Business Names Act 1916 must also disclose the names and former names of its directors, and also their nationality, and former nationality (if they are not natural born British subjects) on catalogues, circulars, showcards, invoices and business letters. Disclosure of their names enables you to identify those in control of the destiny of the Company. You are able to ascertain before you give credit to the Company whether the directors are men of good repute, or men of straw. You must not forget, however, that, even if the directors are men of substance, they are not under any personal liability for the debts of the Company. If, however, they are men of integrity, they are less likely to be engaged upon an enterprise of doubtful financial character. A director is usually required by the Articles of Association to acquire a specified number of shares to qualify him for his office, and if he fails to acquire them within sixty days of his appointment, he automatically ceases to be a director.

As a further safeguard to creditors, there is a statutory obligation placed upon every Company to make an annual return to the Companies Registration Office at Bush House, Kingsway, London, giving certain information regarding its constitution and financial structure. Every Company has its own file, and every file is open to inspection by any member of the public upon payment of a fee of 1s.

Every Company must have an office, known as a Registered Office, at which it may be served with all legal documents. There is no need to institute a search to trace the office of a Company which has ceased to carry on business. The situation of its Registered Office is on the file at Bush House, and documents served at the Registered Office are validly served for all purposes.

There is no limit to the objects which a Company may set out to achieve when it is first promoted. The only legal obligation is to define these objects clearly and specifically in a document, called the Memorandum of the Company, which has to be filed with the Registrar of Companies, before a certificate of incorporation is issued. The usual practice is to define the principal objects of the Company first, and then to take extensive powers to carry on business of an ancillary nature, or upon which the promoters may later wish to embark. If, however, a Company carries on a business which is beyond its defined powers, it is said to act '*ultra vires*' (beyond its powers), for when it has defined the objects of its existence, it may never do any act beyond the scope of those defined powers, without first obtaining the leave of the Court to alter its objects. Moreover, as every *ultra vires* act is null and void, those who enter into a contract with a Company should satisfy themselves that it has power to enter into the proposed contract. As the memorandum is open to inspection, a plea of ignorance will not avail if a contract entered into by the Company is later found to be *ultra vires*. There are, however, some cases in which one or more directors of the Company may be personally liable for *ultra vires* acts, in the same way as an agent may sometimes be personally liable when he has acted without authority, a matter which was considered in Chapter 5.

The memorandum must also specify the amount of the nominal capital of the Company. This enables everyone to obtain an indication of its financial structure, before trading with it on credit terms. A Company may be formed with a nominal capital of £1 or even less, or with a nominal capital of a million pounds or more. The expression 'nominal capital' must be distinguished from 'issued capital' and from 'loan capital'. The nominal capital is the maximum sum which the Company takes power to issue in the form of shares. The issued capital represents the actual sum which has been subscribed for shares, issued either for cash or for some other valid consideration. Loan capital, or 'debentures' represents the capital borrowed by the Company.

The share capital of a Company need not necessarily be subscribed for in cash. For instance, if a Company purchases a business as a going concern, the vendors of the business may accept payment of the purchase price in shares, instead of in cash. When these shares have been issued, or allotted, to the vendors they will be part of the issued share capital. If, however, the business acquired by the Company is purchased for the sum of, say, £1,000, the Company is not entitled to allot shares in excess of a nominal value of £1,000 in payment. No share may be issued by a Company at a discount, or for less than its face or par value, although a Company may, if its 'Articles' permit, pay a commission, called an underwriting commission, not exceeding 10% of the nominal value of the shares.

Shares may be of different classes. The three principal categories are preferred shares, ordinary shares and deferred shares. Provision is usually made for the preferred shares to receive a dividend—*i.e.*, a percentage of the profits which are available for distribution—in priority to the other shareholders. Their dividend each year will usually be limited by the terms of issue to 5% or 6% of the face value of each share. In addition, they may have priority rights to the return of capital, over other classes of shareholders, when the Company is liquidated. Ordinary shares usually take a larger percentage of the profits, but are not normally entitled to receive any of the distributed profits, until the preference shareholders have

received their dividend in full. Deferred shares usually come last, but may take, by way of dividend, all profits not distributed to the preference and ordinary shareholders. A 'cumulative preference', or 'Cum. Pref.' share is a share which entitles the holder to carry forward arrears of dividends, when there is insufficient profit in any year to pay the shareholder the dividend for that year. When the Company is again earning sufficient profit to declare dividends, the holder of 'Cum. pref.' shares receives payment of arrears, before the other shareholders receive a dividend. Shareholders are not entitled to receive any dividend in any year in which the Company has earned insufficient profit to provide for a distribution, for dividends may only be paid out of profits.

As the nominal capital may not give a true indication of the financial structure of a Company, it is also necessary for every Company to include in its annual return a statement which shows the amount of the issued share capital. If, upon inspection of a Company's file, it is found that the annual returns are not up to date, it is some guide that its business affairs are not conducted with the regularity demanded by the law.

The Memorandum must be filed prior to the incorporation of a Company, and revenue fees or duties are payable at the rate of 10s. % on the nominal capital of the Company.

In addition to its Memorandum, every Company must file with the Registrar a document, called the 'Articles of Association'. The Articles of Association, usually referred to as the 'Articles', are the rules and regulations which govern the internal management of the Company, and constitute a contract between all the members and the Company. The Articles must not be confused with the Memorandum. The Memorandum defines the objects of the Company. The Articles define the administrative procedure to be adopted by the Company. There is annexed to the Companies Act 1929 a schedule of specimen articles for a Company called 'Table A'. Many Companies adopt 'Table A' as their Articles, with such modifications as appear in each case to be desirable to the Company's professional advisers.

Among the matters dealt with by the Articles are the rules relating to the issue and transfer of the shares in the Company, the rights of the shareholders as to dividends and voting, the procedure to be adopted at meetings of the Company, the appointment and retirement of directors, and their powers and duties.

The Memorandum and the Articles of a Private Company must each be subscribed by two signatories, and of a Public Company by seven signatories. Each signatory must subscribe for at least one share in the Company.

Company law is one of the most complicated branches of our legal system. It cannot reasonably be simplified, when you are dealing with the rules and regulations under which an artificial body is to conduct its business. These rules and regulations have to be designed to meet every situation, although alterations in the Articles, unlike the Memorandum, may be effected without the leave of the Court, by a resolution of the shareholders, called a Special Resolution. A Special Resolution is a resolution which is passed at a meeting of shareholders, properly convened, by at least twenty-one days' notice by a majority of 75% in value of the shareholders who take part in the voting.

When all the formalities relating to the formation of the Company have been completed, and the necessary fees have been paid, the Certificate of Incorporation will be issued, and when this is received, the Company is allowed to commence its business. Every Company must exhibit its Certificate at the registered office of the Company, and must also affix a notice outside the door to indicate the office as being the Registered Office.

As soon as the Certificate of Incorporation is received, the subscribers should appoint the directors, if they have not been appointed by the Articles. Among the first duties of the directors will be the issue of the shares to the original signatories to the Memorandum, and this is done by formally impressing the Seal of the Company on each share certificate in accordance with the provisions of the articles, and pursuant to the resolution of the Board of Directors.

The Seal of a Company is always affixed 'pursuant to a resolution of the Board of Directors'. It is the talisman of the Company, and is a necessary adjunct to its business, as although a Board of Directors may empower either individual directors or managers to enter into contracts on behalf of the Company, most contracts of importance made by the Company are executed under seal.

COMPANIES (*Continued*)

'All the speeches put together did what they were intended to do, and established in the hearers' minds that there was no speculation so promising, or at the same time so praiseworthy, as the United Metropolitan Improved Hot Muffin and Crumpet Baking and Punctual Delivery Company.'

Nicholas Nickleby

SOME of the obligations of the directors, or the persons who operate a Company, were given in the preceding chapter. The Articles define many of their powers and duties. The law imposes a number of further obligations. If you wish to promote a Company to control your business, you should acquire some knowledge of the duties of a director before you embark upon the adventure. Many Companies are operated in an irregular manner, and most of these have a short life. It is a privilege to be permitted by the law to undertake a commercial risk under the cloak of limited liability. You abuse the privilege if you are not willing to accept the corresponding responsibility.

It is not easy to define the exact status of a director. In some respects he is the servant of the Company. Sometimes he is its agent. On other occasions he is the trustee for the shareholders. It is always his duty to act with integrity. If he acts fraudulently, or with gross negligence, or *ultra vires*, he may be dismissed by the shareholders or by the Board of Directors. He may also be sued in respect of any fraud which he has committed.

A director may only be appointed in accordance with the powers contained in the Articles, and his remuneration may only be fixed in the manner laid down in the Articles. Directors may usually agree among themselves for the appointment of one or more of their number to carry out specific duties, and for this purpose they may be allowed a remuneration additional to their directors' fees. A director is never entitled to act individually, unless he has received

authority to do so from the Board, or unless the Articles give him this power. Subject to any such authority, the affairs of a Company are conducted by the Board of Directors of the Company collectively. Each director must normally carry out such duties as are imposed upon him by the Board as a whole. If he exceeds his authority, he may make himself personally liable for any unauthorised act.

If a director has a dispute with his co-directors, they may pass a resolution which will limit his powers to the bare statutory rights of a director. This means he will be entitled, at all reasonable times, to inspect the books and the accounts of the business, and to satisfy himself that its affairs are being lawfully conducted. He will be entitled to attend meetings of the directors, and he will be entitled to express his opinion. He will not, however, be entitled to take any active part in the management, and he will not be entitled to give instructions to individual employees of the Company.

A Private Company may have one or more directors. The minimum and maximum number will be prescribed by the Articles. If there is more than one director, it will be necessary to hold directors' meetings from time to time, in order to decide upon the policy of the Company, unless the Articles authorise resolutions of the directors to be passed without the formality of a Board meeting. Minutes of the business transacted at directors' meetings should be carefully and accurately kept. If you promote a Company, but have no experience of office routine, you should appoint a competent person to act as Secretary. It will be part of his duty to keep minutes, and to observe generally the statutory requirements relating to Companies.

Once each year, the directors must lay before the annual general meeting of the Company accounts which will show the financial results of the business transacted by the Company during the previous twelve months. The normal business transacted at the annual general meeting of shareholders will include the question of dividends and the election of directors, as well as the approval of the accounts. Shareholders may accept or reject any recommendation made by

directors as to the declaration of a dividend. They also have power to re-elect retiring directors, and to appoint new directors. Other business transacted at the annual meeting is usually formal. The shareholders are, however, always entitled, and frequently expected, to show their appreciation of the services rendered to the Company by the directors, by passing a resolution to provide for payment of directors' fees, and at the conclusion of the meeting it is traditional to pass a vote of thanks to the Chairman of the meeting. No meeting of shareholders can be effective unless there is a 'quorum' present in person. A quorum is the minimum number of shareholders, prescribed by the Articles, required for the purpose of transacting business at any meeting of the Company. Any shareholder who does not intend to attend the meeting may give a 'proxy' to another shareholder to vote for him. A proxy is a document by which one shareholder appoints another to vote in his place, and it is invalid unless a *1d.* stamp has been fixed on it before signature. The Articles will prescribe the form which the proxy is to take, and it will be used only when a 'poll' is taken on a resolution placed before the meeting. A resolution is first put to a meeting for a decision on a show of hands, given by those present and entitled to vote. If no poll is demanded, the result of the show of hands decides the fate of the resolution. If, however, a poll is demanded in proper form, a shareholder is often entitled to one vote for each share which he holds, so that if he holds 100 shares he may be entitled to 100 votes. The Articles will, however, in each case, prescribe the exact voting rights of shareholders, both on a show of hands and when a poll is taken, and they will also prescribe the circumstances in which a poll may be demanded.

In addition to the annual general meeting, which is called an 'ordinary' general meeting, the Company has power to hold 'extraordinary' general meetings for the transaction of special business—special business being any business outside of normal routine, *e.g.*, a proposal for alteration of the Articles would be special business.

The dividends which a Company may decide to pay at a general meeting are the sums which the shareholders decide, upon the recommendation of the directors, to distribute among the shareholders, out of the profits of the Company, the rights of the different classes of shareholders being regulated by the Articles. Income tax at the full standard rate must be deducted by the Company before payment of the dividend to each individual shareholder, but if the total income of the shareholder for the year is a sum less than that upon which he would be liable to pay tax at the full standard rate, he will be able to obtain a refund of overpaid tax from the Revenue. The subject of income tax is dealt with in Chapter 28.

A trading Company is entitled to borrow money, unless its memorandum expressly precludes it from doing so. Other Companies may borrow if the Memorandum contains the necessary power, and within the limit of such power. If a Company proposes to charge all or any of its assets as security for a loan, it will seal a document, called a debenture or charge, which is a mortgage recording the terms and conditions of the loan. When a debenture or a charge is given, a notice in a required form must be lodged with the Registrar of Companies within twenty-one days. Particulars of the charge are added by the Registrar to the file of the Company, and are available for inspection by any member of the public. If, however, the notice is not lodged within twenty-one days, the debenture-holder will lose the benefit of his security, unless he obtains an order from the Court which extends his time for filing the notice. The object of registration is to protect creditors, for, if there was no register of debentures or charges, a creditor would have no means of knowing that the Company had charged its assets, even although he had inspected the file of the Company. The Register of Charges should, accordingly, be inspected, in order to obtain a picture of the financial position of a Company.

If default is made by a Company in complying with the conditions of issue of any debenture, the debenture-holder

usually has power given to him, by the terms of the debenture, to appoint a Receiver and Manager over the property which has been charged. The Court also has power to appoint a Receiver and Manager at any time after the principal monies secured by the debenture have become due, if the debenture-holder is able to satisfy the Court that his security is in jeopardy. In most cases the appointment of a Receiver and Manager puts an end to the directors' powers. The Receiver and Manager takes control of the management of the Company, and his primary duty is to protect the debenture-holder. The debt to the debenture-holder must be paid before other debts due from the Company, with the exception of certain priority claims, including rates and taxes, within certain limits, and also wages and salaries, for a specified maximum period. A Receiver and Manager is frequently faced with difficult problems, and he must act strictly within his powers, or he may make himself personally liable for debts. For this reason, it is usual to appoint a qualified accountant or other person of experience as a Receiver and Manager.

A Receiver is not under a personal obligation to discharge debts, even although contracted after the date of his appointment, unless he has exceeded his powers or expressly agreed to accept personal liability. Although the Receiver is usually nominated by the debenture-holder, the law deems him to be the agent of the Company, and you will remember from Chapter 5 that an agent is not, normally, personally liable for debts incurred by him on behalf of his principal.

If a Company has been formed for a specific purpose, and that purpose has been fulfilled, the Company may be put into liquidation. That is to say, its life may be brought to a peaceful end. When John Doe dies, his personal representative must pay his debts, and then realise and distribute his assets. In the same way, when a Company is liquidated, it is necessary for an appointed person to liquidate its affairs, before the Company is dissolved. He is called the 'liquidator'.

If the Company is solvent when the proposal for liquidation is made—*i.e.*, if it is able to pay its creditors in full—the directors may file a 'declaration of solvency,' and the

shareholders may resolve upon a form of liquidation known as a 'members voluntary winding-up'. A declaration of solvency is a solemn declaration made by a director declaring that the Company is solvent and able to pay all its debts within a period of twelve months. The shareholders may then appoint a liquidator to proceed with the liquidation.

When a Company is not able to pay its debts, the shareholders may pass a resolution for liquidation, and invite the creditors to nominate the liquidator. This is called a 'creditors voluntary winding-up.' When a liquidator is appointed, he must, normally, dispose of the business of the Company and all its assets to the best advantage, and out of the money which he receives he must pay the debts due from the Company. There are certain debts which are 'preferential' and must be paid in priority to other debts. The rule as to preferential debts is very similar to that which prevails in bankruptcy, and preferential debts generally are dealt with in Chapter 21.

Many Companies end their activities in voluntary liquidation or winding-up. The appointment of a liquidator terminates the activities of the directors, and they have no power to act after his appointment, but voluntary liquidation is frequently convenient to directors when they do not desire their conduct to be too closely scrutinised by the shareholders of the company. Although the Court has extensive powers of investigation when there is a voluntary liquidation, these powers are seldom invoked. There is a general tendency among shareholders and creditors to cut a loss when a Company is in liquidation. They do not desire time and money to be wasted on investigations, which will be difficult and costly to pursue. It frequently happens, accordingly, that directors are able to avoid awkward questions as to their activities, by persuading shareholders and creditors to agree to voluntary liquidation.

A liquidator does not always act upon his own responsibility in liquidating the affairs of a Company. The creditors have power to appoint a committee, called a 'Committee of Inspection', to act with the liquidator. If the members of the

Committee are energetic, they may frequently insist upon investigations, which might not otherwise be undertaken.

Compulsory liquidation, as distinct from voluntary liquidation, may be procured when a creditor or a shareholder presents a petition to the Court asking for a winding-up Order. Instances when a petition will be appropriate include cases in which a Company is unable to pay its debts, or fails to pay a debt within twenty-one days of demand, or fails to discharge a judgment obtained against it. If the relevant facts are duly proved by the petitioner, the Court may order the company to be liquidated and the management of its affairs will then come under the jurisdiction of an official of the Board of Trade called the Official Receiver.

There are many grounds upon which the Court may make a winding-up order, and without specifying them in detail, it may be said, broadly speaking, that the Court has power to make a winding-up order in every case in which it is 'just and equitable' for it to do so. This phrase must be interpreted reasonably. The Court will not act arbitrarily. It will take every factor into consideration. The power to make the order is a discretion vested in the Judge who hears the petition. For example, a winding-up order may be made in a case in which deadlock is reached between two shareholders holding between them in equal shares all the issued share capital of the Company, and where there is no other person who has any power to intervene in the management of the business. Again, a winding-up order may be made if the 'substratum' of the business of the Company has ceased to exist, or if there is no reasonable hope of carrying on the business of the Company at a profit.

When a Company is in liquidation every creditor and shareholder of the Company will receive a notice which invites him to attend a meeting. At this meeting the financial history of the Company will be outlined by the Official Receiver. If you are a creditor, and you complete the form which you receive, called the 'proof of debt', you will be entitled to vote at the meeting. Your vote will be invited upon the question as to whether the conduct of the liquidation is

to remain in the hands of the Official Receiver, or whether another liquidator should be appointed. It is common practice to appoint a qualified accountant on these occasions. An accountant sometimes has facilities available for probing the conduct of a defunct Company, and he is not so cramped in pursuing his activities as a Board of Trade official. The Official Receiver does not regard it as a reflection on his office if he is not appointed, and when an accountant is appointed as liquidator, the Board of Trade still has the conduct of the liquidation under its control. As in the case of a voluntary liquidation, a committee of inspection may also be appointed to act with the liquidator. If there is evidence that the affairs of the Company have been conducted fraudulently, charges may be laid against the directors responsible, and if fraudulent trading is proved, the directors may be ordered to pay personally the whole or some part of the Company's debts.

The death of a Company is seldom followed by floral tributes. The conduct of the directors which has led it into the abyss is frequently criticised, but criticism won't repay the creditors their lost money. The caution cannot be too often repeated that you can best protect yourself, and at the same time further your own business interests, by refusing credit to a Company unless you are reasonably satisfied as to its financial status, or at least as to the personal integrity of the directors. It may be hard for a man in a small way of trade to refuse an apparently profitable order, but success in business is not achieved merely by obtaining orders. The 'profitable' order is a snare if the debt is never paid, and you are caught in the trap. Accordingly, you should exercise your discretion in every instance, and you can do this only after you have considered all the relevant facts calmly and dispassionately, and without indulgence in day-dreams.

This and the previous chapter have dealt almost entirely with Private Companies. The principal feature of a Public Company which you are likely to encounter is the 'Prospectus'. This is an invitation to the public to subscribe for shares. A prospectus gives the public particulars of the

business of the Company with details of any results already achieved, and a forecast of future prospects. You will frequently see a prospectus published in the financial columns of a newspaper. Generally a prospectus is an honest document, but in some cases prospects of a most extravagant character are entertained, although there is nothing tangible to justify anticipation of success, or to inspire confidence. Promoters of Companies who advertise in this way are anxious for one thing—to make as much money as they can out of those members of the public who are inveigled by a reference to prospects of great profits.

In order to satisfy the law, a prospectus must comply with a number of regulations. Unfortunately, in the past these regulations have not been sufficiently stringent to afford an effective safeguard to the more credulous members of the public. Although it is necessary for every statement purporting to be a statement of fact to be true, there is little limitation as to the extent to which the promoters may indulge in prophecy or wishful thinking. Phrases in a prospectus may also be ambiguous, although it may not be possible to describe the phrases as untrue. Many of these misfortunes may, however, be rectified at an early date. The Cohen Committee whose report, published in 1945, was referred to in Chapter 7, made extensive recommendations on the subject of prospectuses, and the Government has intimated its intention of embodying them in a new Bill which is now in course of preparation.

If it can be proved that a prospectus contains untrue statements, and these untrue statements have misled an investor who has purchased shares, in the belief that the statements were true, he has a legal right of action for damages against every person who has taken part in the promotion of the Company. Success in an action of this character is, however, unfortunately never easy to achieve. The burden of proof is a heavy one to establish, and a 'prospectus action' is one of the most costly forms of litigation.

Accordingly, if you have money which you wish to invest in a Public Company, you will be wise to hesitate before

you make the investment, for it is impossible for an inexperienced person to distinguish between the good and the bad. 'Mind your own business' is generally an impertinent observation. When, however, we consider a prospectus we should bear the injunction in mind. The prospective investor rarely knows anything of the merits of the venture to which subscriptions are invited, and he is compelled to rely on reports prepared by interested parties, who are anxious to reap the financial benefits of successful publicity. If you mind your own business, you will have less inclination to be interested in that of other people.

BANKRUPTCY

‘Poverty is no disgrace to a man, but it is confoundedly inconvenient.’

Sydney Smith

THE law relating to bankruptcy is principally governed by the Bankruptcy Act 1914. When a debtor is insolvent and unable to pay his debts, he may, after a number of legal formalities, which will be referred to in this chapter, be adjudicated a bankrupt. The conduct of his affairs will then be taken away from him and placed in the hands of a trustee, called the ‘Trustee in Bankruptcy’. It will be the duty of the trustee to realise the bankrupt’s property, and to distribute it among the creditors.

The first step towards bankruptcy is called an ‘act of bankruptcy’. Unless and until an act of bankruptcy has been committed, bankruptcy proceedings cannot be initiated. An act of bankruptcy may be committed by a debtor in several ways. Frequently, if a debtor does not meet his liability under a judgment, his creditor may serve him with a document called a ‘bankruptcy notice’. This requires him either to meet the judgment liability within eight days, or to compound it to the satisfaction of the creditor, and if this is not done, an act of bankruptcy is committed.

There are a number of other acts of bankruptcy. They include the following :—

(1) The seizure and sale by a creditor of the property of a debtor under an ‘execution’. Execution against a firm, described in Chapter 7, may be similarly effected against an individual who fails to pay a judgment debt.

(2) The execution by a debtor of a deed by which he voluntarily assigns all his property to a trustee for the benefit of his creditors generally. Such a deed must be registered, and if not impeached, the trustee may in due course realise the property and divide the proceeds of realisation among the creditors. Any creditor, however, is entitled to

ignore the deed and to 'treat the trustee as a ghost and see through him', if he does not wish to recognise the deed. If he signifies his refusal to be bound by the deed within one month, he may take proceedings in bankruptcy at any time within three months of the date of the deed.

(3) The act of a debtor in absconding or placing himself beyond the reach of his creditors with intent to defeat and delay them. If a debtor is insolvent and wishes to avoid his creditors, it may, for example, be an act of bankruptcy if he leaves England on a world cruise.

(4) Notice of suspension or intention to suspend payment of debts, or filing a declaration of insolvency. The former is a notification by the debtor to one or more of his creditors that, owing to his insolvency, he is not able to meet his liabilities. The latter is a formal document, usually executed under legal advice.

(5) A 'fraudulent preference', which is, generally speaking, a deliberate act of showing preference to one creditor by payment of his debt, after the debtor knows and appreciates that he is insolvent and unable to pay other creditors. If the debtor is adjudicated bankrupt after he has made a fraudulent preference, the preference may be set aside by the Court and the creditor who has been paid his debt may be ordered to refund the money to the Trustee in Bankruptcy. The creditor will then share equally with the other creditors in any distribution subsequently made of the bankrupt's property.

A bankruptcy petition may be presented to a Bankruptcy Court within three months after the date of an act of bankruptcy by any creditor who is owed, or group of creditors who are owed, a specified sum in excess of £50 in the aggregate. The petition asks for the making of an order, called a 'receiving order'—*i.e.*, an order which will direct the 'Official Receiver', a Board of Trade official, whose opposite number deals with the affairs of a Company in liquidation, to receive the debtor's property, and to take over temporary conduct of his affairs. If the debtor applies, on the date fixed for the hearing of the petition, for further time in which to meet his liabilities, the Registrar dealing with

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the case has power to grant one or more adjournments. Otherwise, however, unless the debtor is able to make concrete proposals for settlement of *all* his debts, the Registrar will usually make a receiving order, for the Court considers the interests of all the creditors, and does not permit its machinery to be used as a debt-collecting agency.

When a receiving order has been made, the debtor is still not a bankrupt, but there are no longer any natural obstacles which separate him from bankruptcy, and he must forthwith attend on the Official Receiver and disclose all his financial affairs. The Official Receiver is, moreover, entitled to take immediate possession of all the debtor's valuables, including even any jewellery or watch which he may have on him at the time of the interview. So soon as practicable, it is the duty of the Official Receiver to convene a meeting, called the 'first meeting of creditors'. There is a general belief that it is necessary for a creditor to lodge his claim, or 'proof of debt', as it is called, before this meeting takes place, and that he will otherwise be deprived of his right to share in the distribution of the bankrupt's property. This idea is erroneous. If, in fact, a completed proof of the debt is lodged before the first meeting of creditors, the creditor is entitled to vote at the meeting, but there is no other advantage gained from proving the debt at an early stage of the bankruptcy. It may be proved at any time before a dividend is paid, and this is unlikely to occur for many months, whilst every creditor receives advance notice of any intended dividend.

At the first meeting of creditors, the creditors present and entitled to vote will decide by a formal resolution whether or not the debtor is to be adjudicated bankrupt, and, if they so resolve, they may also decide to appoint a Trustee in Bankruptcy. In practice, it is usual to pass the resolution for adjudication, unless the debtor puts forward a scheme for meeting his liabilities which the creditors are willing to consider. He may, for example, offer a 'composition'—*i.e.*, a proposal to pay a proportion of his debts for a sum of not less than 5s. in the £—and if such an offer is deemed worthy of consideration, the meeting may be adjourned to enable the

scheme to be carried through, with the approval of the Court, after which the bankruptcy proceedings may be annulled. The Court's approval is not, however, automatic. It will consider all the circumstances, and if it is of the opinion that the debtor's conduct requires investigation, it may refuse to sanction the scheme.

If the creditors resolve upon adjudication, they may also decide to appoint a Trustee in Bankruptcy. If they do not do so, the administration of the bankrupt's affairs will remain in the hands of the Official Receiver.

Bankruptcy was at one time regarded as little short of a crime. This view was modified when a Court of Bankruptcy, expressly declared to be a Court for the Relief of Insolvent Debtors, was established in 1831, and after that date debtors who had been confined in prison until their debts had been paid in full, were able to obtain their release as soon as they surrendered all their property. Even so, a bankrupt was not able to start life afresh, for any property which subsequently came into his hands had to be made available for his creditors. He remained, in fact, bankrupt until all his debts had been paid.

The present procedure enables the Bankruptcy Court to grant relief to the honest debtor who has met with misfortune. It may also be used at times by a dishonest debtor to escape payment of his liabilities. The Court, however, has a number of powers for punishing dishonest debtors, and it will use them in proper cases.

When a debtor is adjudicated bankrupt, the resolution of the creditors at their first meeting will, as stated, decide whether his affairs are to be left for administration in the hands of the Official Receiver, acting as the Trustee in Bankruptcy, or in the hands of an accountant or other person qualified to act as trustee. The duties of a trustee are analogous to the duties of the liquidator of a Company dealt with in the previous chapter, although his powers are more extensive. Moreover, as in the case of the liquidation of a Company, the creditors have power to appoint a committee, called a 'committee of inspection', to act with the trustee.

It is the duty of this committee, which consists of not fewer than three and not more than five of the creditors, to consider questions which arise in the bankruptcy, as, for example, whether the trustee is to compromise a claim, or to take or defend proceedings.

When a debtor has been adjudicated bankrupt, the bankruptcy dates back, generally speaking, to the act of bankruptcy on which it was founded. All financial transactions entered into by the bankrupt after that date are liable to be set aside. Anyone who has received money from the bankrupt, with knowledge of the act of bankruptcy, may accordingly be called upon to repay the money to the trustee. A creditor is never safe in accepting a payment from a debtor, when bankruptcy proceedings are pending, unless the money has been provided by a third party.

A bankrupt is under a number of obligations to his trustee. Primarily he must make full disclosure and supply full information about his affairs. From the moment of his appointment, the trustee becomes, in effect, the owner of the bankrupt's property. It is said to 'vest' in him, and the bankrupt no longer has any rights over it.

The expression 'property' is a comprehensive one. It is sufficiently wide to include all property which the bankrupt has in his possession, or under his control, in the way of his trade or business, with the consent of the true owner, and of which he is the apparent owner. Even 'after-acquired property'—*i.e.*, property which comes into the hands of the bankrupt after the commencement of the bankruptcy—may pass to the Trustee in Bankruptcy. This includes both legacies and gifts. Property which the bankrupt holds in trust for a third party under the terms of a bona-fide trust, and also the actual tools of his trade, together with his bedding and wearing apparel up to £20 in value, are, however, all excluded. It frequently happens that a debtor is hard pressed, and in order to raise cash, he sells or mortgages his furniture, but by arrangement with the lender he retains it in his possession and continues to use it. If he is subsequently made bankrupt, the lender may then lose the furniture, as it may be the

'property' of the bankrupt within the scope of the definition. To meet this difficulty, the lender may avail himself of the facilities offered by the Bills of Sales Acts 1878 and 1882. A 'bill of sale' is a legal document executed when personal chattels are to remain in the possession of the vendor after their sale, or after they have been charged as security for a loan. A bill which records an actual sale is called an 'absolute bill of sale'. In other cases it is called a 'bill of sale by way of security'.

Bills of sale are highly technical documents. A number of formalities must be strictly observed both before and after signature. Unless there is compliance with every detail, the bill of sale may be declared void and the protection which it was intended to secure will be lost. Among the formalities required are the registration of the bill at the Registry called the Bill of Sale Registry, which is open to inspection by every member of the public. Registration must be effected within seven days after execution, and thereafter every five years. Notice of all such registrations is given in the publications of the Trade Protection Societies, and many traders subscribe to one or other of such societies to enable them to ascertain something of the financial status of a new customer before extending credit. From a practical point of view, a bill of sale is sometimes the last resource available to a harassed debtor, for it frequently destroys such credit as he still enjoys. In many cases it therefore merely postpones the inevitable financial crash.

Although a bankrupt is compelled to surrender all his property, he is entitled to continue to earn his living, subject to certain restrictions. He is not, for instance, fettered as to the work which he chooses. If, however, he obtains employment which yields him more than an adequate wage or a reasonable standard of living, the Court has power to order part of his earnings to be set aside for the benefit of his creditors. Moreover, the law protects the community from unfair trading activities during bankruptcy, for if the bankrupt continues to trade, he is not entitled to incur credit in excess of £10 without informing the proposed creditor that he is an

undischarged bankrupt. He is also not entitled to act as a director of a limited company, or to take part in the active management of the company, unless he first obtains the consent of the Court. A breach of any of these obligations renders him liable to a criminal charge.

A trader may have a bona fide wish to protect his wife or family, if he is unfortunate in his business affairs. In order to achieve this aim he may settle or place his property in his wife's name. If he complies with the necessary formalities and is subsequently adjudicated bankrupt, the creditors, as a general rule, will have no claim to the settled property. There are, however, two cases in which the trustee may claim the settled property for the benefit of the creditors. The first arises if a man is made bankrupt within two years of making a voluntary settlement, and as the expression 'settlement' includes gifts, it means that if the bankrupt has presented his wife, within two years prior to his bankruptcy, with £1,000 or a pearl necklace, she will be ordered by the Court to hand it back to the Trustee in Bankruptcy. A voluntary settlement, however, does not, generally speaking, include a settlement made by a man in favour of his wife on his marriage. Marriage is a good consideration in law for an agreement to settle property, and property so settled will not revert to a trustee in the event of subsequent bankruptcy. The second case arises if the bankrupt has made a settlement within ten years prior to his bankruptcy. In such an event, however, the settlement will not be set aside as a matter of course. The trustee will only have a claim to the settled property, if the bankrupt is unable to prove that he was solvent when he executed the settlement—*i.e.*, that he was able to pay all his debts without the aid of the settled property.

These exceptions do not mean that a wife may claim the stock in trade of her husband's business on the ground that he had given it to her five years before his bankruptcy, and that he was solvent at that time. The trustee may normally always claim the stock in trade of the business of a bankrupt. On the other hand, if husband and wife are living together, she is not barred from claiming that the household effects are her

property. Such effects are not the property of the bankrupt in his possession in the way of his trade or business.

In every bankruptcy a date is fixed for the examination of the affairs of the bankrupt in open Court. This is called the 'public examination'. At this examination the bankrupt must answer upon oath any questions asked of him either by the Official Receiver, the trustee, or any creditor. If he refuses to do so, it is a contempt of Court punishable by imprisonment. The examination is designed to throw light upon the causes of the bankruptcy and the affairs of the bankrupt. Any conduct which suggests fraud will be closely scrutinised.

When a Trustee in Bankruptcy administers an estate there are certain debts due from the bankrupt which have to be met in priority to the general claims of the creditors. They are said to be 'preferential debts'. They include certain wages and salaries due to employees, and also certain rates and taxes and National Insurance contributions due to the Crown. Although a landlord is not a preferential creditor for rent, he is in a favourable position if he has levied a distress, for in order to save the debtor's assets from sale under the levy, the trustee may agree to treat the landlord's claim for rent up to a maximum period of six months as being preferential.

When the trustee has paid the preferential debts, and has realised sufficient assets to enable him to make a distribution to creditors, he will give notice of his intention to pay a dividend. Irrespective of the payment of a dividend, however, and at any time after the conclusion of the public examination, the debtor is entitled to apply to the Court for his discharge from the bankruptcy. Every creditor receives notice of this application, and is entitled to oppose it. Opposition is not usually necessary, for before deciding whether to grant or refuse such an application the Court will always examine the circumstances of the bankruptcy, which are detailed in a report prepared by the Official Receiver. Facts in this report may be disputed by the debtor, and if the Court is satisfied that the bankruptcy was the result of misfortune, it has

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power, in certain cases, to order the immediate discharge of the bankrupt. On the other hand, if the Court considers the bankruptcy to have been brought about by fraud, or by rash and hazardous trading, or extravagance, the discharge may be 'suspended', or even refused. In some instances the Court has no power to grant a discharge without a period of suspension. These include bankruptcies in which: (1) the assets are insufficient to provide a dividend of 10s. in the £ to the creditors (except in the case of misfortune); (2) proper books of account have not been kept; (3) the bankrupt has traded after knowledge of his insolvency; (4) the bankrupt has contracted debts without reasonable probability of being able to pay them; (5) the bankrupt has failed to give a satisfactory account for the deficiency in his assets; (6) the bankrupt has contributed to his bankruptcy by rash and hazardous speculation, gambling or extravagance; (7) the bankrupt has been guilty of a fraudulent preference; (8) the bankrupt has been adjudicated bankrupt on a previous occasion; (9) the bankrupt has been guilty of fraud.

If the Court decides to grant the discharge, subject to a suspension or otherwise, it may also require the bankrupt, as a condition of the discharge, to submit to a judgment for a specified sum, and it may either order that this sum shall be paid forthwith, or direct payment by instalments, out of future earnings of the debtor.

As soon as the discharge becomes effective, the bankrupt is again a free man. He may then carry on any trade or business without restriction. There are, however, some obligations which he must still meet. They include any claim arising out of a judgment for fraud, or for damages for seduction, and also the claims of a former wife for maintenance. No husband can rid himself of his liability to support his wife. The Crown also has power to claim arrears of Income Tax, but in practice it does not do so.

There are occasions when a trader realises that his financial position is desperate and he is anxious to rid himself of his burdens as easily and as quickly as possible. There are alternative courses which he may pursue in such a case.

Firstly, an insolvent trader is always at liberty to present or file his own petition in bankruptcy, instead of waiting for a creditor to make the first move. As an alternative, he may execute a 'deed of assignment' of his property to a trustee, one of the acts of bankruptcy referred to earlier in the chapter, and a third alternative is to effect a composition with his creditors. If he wishes to adopt this method, he may inform them that he has debts which amount to £1,000 but assets of a value of only £500, and he may then offer each creditor a composition of 10s. in the £. Normally, if you offer a creditor £50 cash in settlement of a debt for £100 he may take your money and still lawfully claim payment of the balance. Unless the acceptance of a lesser sum for a larger amount is accompanied by the legal consideration which is essential to every contract, it is not an enforceable agreement. On the other hand, if a debt is genuinely disputed and you contend that you owe the creditor £25, when he claims that you owe him £100, you are entitled to agree to settle the claim for £50. In such a case the mutual agreement to compromise the dispute, as an alternative to litigation, affords a valid legal consideration. After such an agreement has been concluded, the creditor is not entitled to pursue his claim to the balance. When you offer your creditors a composition you do not dispute the debts which you owe, but a valid and enforceable agreement may always be made in such a case. The mutual forbearance by the creditors not to sue, but to accept the composition, is a valid legal consideration, and the debtor would therefore be able to resist any subsequent claim made against him by any creditor to enforce payment of the balance of the debt.

Any composition by a debtor with his creditors must always be recorded in a deed registered in the same way as a deed of assignment, and if it is not so registered, it is void. Any creditor who refuses to agree to the composition is at liberty to start bankruptcy proceedings, but unless the proceedings are commenced within three months after the date of the deed, it becomes valid and binding on all the creditors. Every creditor is thereafter, by operation of the law, deemed

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to have accepted the composition and is bound by its terms.

An insolvent debtor has yet a fourth method by which he may rid himself of his liabilities. If his friend, John Doe, wishes to assist him financially, John Doe may make a cash offer to each of the creditors in turn to buy up his debt for less than its full amount. Arrangements of this character may be informal, for there is nothing in law to prevent one creditor from making an agreement with a third party to sell his debt of £100 for £25, whilst another creditor, either more hard-hearted or more shrewd, who is owed a similar amount, may require payment of £75. Unless John Doe makes a false representation and contends, for example, that every creditor has agreed to settle on the same *pro rata* basis, the creditor who sells his debt for 5s. in the £ has no remedy, if he subsequently ascertains that another creditor has received better terms.

Any one of these alternatives may be preferred to bankruptcy both by creditor and by debtor. Any one of them may result in a more speedy settlement of claims than the tortuous procedure of bankruptcy. On the other hand, creditors will be wise to scrutinise any such proposals with vigilance. If creditors are unwary, these methods are capable of allowing an easy escape to a dishonest debtor. A creditor will be wise not to accept with alacrity the first offer made to him, unless he is satisfied, either that the debtor has been the victim of genuine misfortune, or that he is a man of undoubted integrity who would not be guilty of sharp practice. An unscrupulous debtor who avails himself of any of these methods successfully will not only avoid exposure in the Bankruptcy Court, and rid himself cheaply of his creditors, but will also be able to retain funds for fresh business trickery. It may not always be desirable to adopt caution in a world which is in need of courage and initiative. In travelling along the high road of life, however, we all meet rogues and scoundrels. Accordingly, when we deal with strangers, 'Forever amber' might well be our watchword.

PATENTS, DESIGNS, TRADE MARKS AND COPYRIGHT

'A fortune is being made by a man of 99, who after 16 years of self-imposed poverty, living on £2 a week, invented and patented a method of turning old bibles into gun-cotton, artificial silk, cellulose, and expensive note-paper. His machinery has already been installed at a Cardiff factory, and at eight others in various parts of the country where armaments are being made from ancient testaments.'

Daily Express (quoted in 'This England')

This chapter deals with special rights, firstly, in what may be termed industrial property, and, secondly, in artistic property, which is capable of a proprietary right, legally called 'copyright'.

Industrial property may be classified under three headings: Patents, Designs and Trade Marks. The first two of these are governed by the provisions of the Patents and Designs Acts 1907-1942 and the latter by the Trade Marks Act 1938. We must deal with each in turn.

A patent gives the owner a monopoly right to use, exercise and vend a novel invention, for which Letters Patent have been granted. The words 'patent applied for' are frequently seen on manufactured articles or in advertisements. The phrase means that the manufacturer, or the advertiser, claims to be the inventor of the article in question, or the process by which it is produced, and that he has made the required application to the Patent Office in Chancery Lane, London, for a grant of Letters Patent in respect of the invention. It does not, however, mean that the patent will necessarily be granted.

A patent may be granted to the true and first inventor of an invention which possesses utility and novelty. Although the degree of utility need not be great, a substantial degree of novelty is essential, and a patent will not be granted unless the Comptroller-General of Patents is satisfied that the proposed

patent is novel, in the sense that it has never previously been published or publicly used in this country, either by the inventor himself, or by anyone else. When two inventors make the same invention independently, and at about the same time, the first to file his patent application at the Patent Office obtains precedence, and the other gets no patent rights at all in the invention.

Invention must be something of a tangible or concrete character which has not previously been projected. You cannot patent an abstract idea, or some fanciful notion designed for the improvement of the human race. If you had been 'eight years upon a project for extracting sunbeams out of cucumbers, which were to be put into vials hermetically sealed, and let out to warm the air in raw inclement summers', you would not be able to patent the idea. An application for a patent could be entertained only after you had worked out the details of the process by which the sunbeams were to be extracted. If, however, you had prepared plans for the type of machine, or the process by which you hoped to obtain your results, you could apply for a patent. Your results, whatever form they might take, would have to be phrased in a document called a 'provisional specification', sometimes accompanied by one or more plans, or blue prints. Inventors usually avail themselves of the services of a patent agent if they propose to apply for a patent. It is not simple for an amateur to deal with the technical requirements of a specification, and a patent agent is a skilled expert, trained for the job.

When an application for a patent is filed, it does not give the applicant any immediate protection. Anyone may, for the time being, copy the invention without risk of proceedings, but if the patent is subsequently granted, the patentee may immediately apply to the Court for an injunction to restrain its infringement.

After the application has been filed, the applicant is entitled to work the invention publicly, and in greater detail, and the results of his experiments may be embodied in a further or complete specification, which must be lodged

within a period of nine months after the original or provisional specification. This complete specification may include a much fuller description of the practical way of carrying out the invention, but it must not differ materially from the provisional specification in respect of the nature of the invention itself.

One of the duties of the Patent Comptroller, when a specification is lodged, is to investigate the files of prior specifications, and other relevant publications, in order to ascertain whether the invention can satisfy the test of novelty, and he may require amendment of the complete specification, so as to give protection only to such part of the invention as is novel. Alternatively, he may refuse a patent in any case in which there has been prior publication of the whole invention. Before the patent is granted, the specification is laid open to public inspection for two months, to enable any aggrieved person who has proper grounds for the belief that the patent ought not to be granted to oppose the grant. Any such opposition is adjudicated upon by the Comptroller, after considering all the evidence.

When two or more people have jointly evolved the invention, the names of all the inventors must be included in the application for the patent. This frequently occurs when a company finances the development of an invention. A workman who carries out the instructions of the inventor in working out practical details of the invention is not a joint inventor, unless he has personally added to or shared in the actual process of invention, as distinct from following the instructions given to him.

When a patent is granted, the owner has a monopoly or sole right of exploitation for sixteen years. This period may be extended by the Court, in certain circumstances, for five years, and in exceptional cases a second term of five years. When application is made for an extension, the matters to be taken into consideration by the Court before it comes to a decision are the nature and merit of the invention in relation to the public, the profits made by the patentee, any claim made by the patentee that he has not received adequate remuneration

as a result of handicaps in exploitation, and any other circumstances which might be considered relevant to the request.

The owner of a patent need not necessarily manufacture it himself. He may sell the right, or lease, or license it, on such terms, within limits, as he chooses to dictate. He is not, however, allowed to include in a licence any term which is calculated to prejudice unfairly any trade or industry in the United Kingdom, nor is he allowed to include a condition which prohibits or restricts the use of articles supplied by a third party, or compels the licensee to use other articles not protected by the patent. The Acts declare any such conditions to be null and void, since they are in restraint of trade, and contrary to public policy.

Moreover, if a patentee abuses his monopoly rights by failing to exploit his patent, and refusing to grant licences to others to do so, as a result of which the interests of the community are prejudiced, the Comptroller of Patents has power—although it is rarely exercised—to compel him to grant licences for its exploitation, or, in extreme circumstances, even to revoke a patent. It is a common belief that abuse of monopoly rights is widespread, especially among powerful companies. Is the fact that these provisions of the Patent Acts are extremely rarely invoked evidence that the belief is not well founded?

When a patentee brings an action to restrain infringement of his rights, he will usually ask for an injunction and for damages. The defendant may resist the claim on a number of grounds. He may contend, among other defences, that the invention is not novel, or that it is lacking in utility, or that the specification is inadequate, or that the name of the true inventor was not included in the patent, or that he has not in fact infringed the patent. These, and other technical defences, which may be raised in a patent action, are all of a complex character.

If, however, you are the owner of a patent, and you think that it is being infringed, you must act warily before you formulate your complaint. There is a unique form of action, applicable only to patents, called a 'threats action'.

In the normal way, if you write a letter to complain of an infringement of your legal rights—*e.g.*, a nuisance by noise, or a trespass to your land, and you hint at possible legal proceedings, the recipient of your letter does not retaliate by issuing a writ against you. In the case of a patent, however, any letter, or other threat, by a patentee, complaining that his patent is being infringed, may be immediately countered by the issue of a writ by the alleged infringer, asking for an injunction to restrain a repetition of the threat, and for damages. The onus is then placed on the patentee to establish the validity of his complaints.

A patentee is in a highly privileged position during the life of his patent. When, however, it has expired, his invention is open to exploitation by all, since every patent specification is available for inspection. If an inventor shuns disclosure of his invention, he should not apply for a patent. He can only rely upon a secret process. In that event, however, the inventor will be deprived of all legal protection for his process, if the secret is solved by another manufacturer.

A registered design gives the owner a monopoly right (analogous to that possessed by the owner of a patent) in respect of industrial designs, wherein the novelty resides wholly in shape, or in appearance. No proprietary rights exist in any industrial design, unless it has been registered under the provisions of the Patent Acts, and it is sometimes difficult to determine when an artistic production, which will automatically be protected by the Copyright Act 1911, to be considered later, ceases, by industrialisation, to receive such protection and passes into the realm of registrability as a design. Broadly speaking, in order to be capable of registration, a design must be one which is intended to be produced in quantity for industrial purposes. Although the law as to registered design is closely akin to the Patent Law, and it is advisable to invoke the services of a patent agent if you wish to register a design, an essential difference between a registrable design and a patentable invention is that the test of novelty in a design (and likewise also the test of infringe-

ment in a registered design) lies wholly in the appeal to the eye—that is, as stated, in the appearance, or shape, or configuration, of the article, as contrasted with its practical usefulness. Novel patterns on wallpaper, curtains, upholstery, and dress materials and also many varieties of mass-produced simple articles of attractive and novel shape or appearance are frequently registered as designs.

Trade marks are marks by which merchants and manufacturers brand their goods for the purpose of distinction. The sole right to use a particular mark may be acquired, without registration, by long exclusive use of the mark, but in general it is wise to register a trade mark in order to establish the right satisfactorily. In every case infringers or plagiarists may, subject to certain conditions, be restrained by injunction, and sued for damages and other ancillary forms of legal relief.

By the terms of the Trade Marks Act 1938, a trade mark is capable of registration only if it contains one of a number of alternative essential features. These include: (1) the name of a company, individual or firm represented in a special or particular manner; (2) the signature of the applicant or a predecessor in his business; (3) an invented or invented words; (4) a word or words without direct reference to the quality of the goods, and not, according to its ordinary signification, a geographical name or a surname; (5) any other distinctive mark, subject to certain limitations. These are general indications only of the character which a trade mark must assume. There are a number of qualifications and restrictions on registration, and anyone contemplating registration should seek advice from a patent agent. Application to register a trade mark may be made in one or more of thirty-four classes, ranging from 'chemical products', which fall within Class 1, to 'tobacco, raw or manufactured', which comes within Class 34. The applications must be made on special forms, and must be lodged with four representations of the mark, prepared in exact compliance with the rules, and a filing fee of £1. After the application has been made a certificate of registration does not follow as a matter of course.

The Comptroller must be satisfied that the proposed mark does not resemble any existing mark to such an extent as to be likely to cause confusion, and not only must search be made, but the proposed mark must be published in the official *Trade Mark Journal*, to enable opposition to be lodged by any objector, who considers that the mark may injure his existing legal rights. When such an objection is lodged, the Comptroller has power to adjudicate upon the dispute, in accordance with prescribed procedure.

The issue of a certificate of registration entitles the holder to privileges analogous to those which accrue to the owner of any other property. He has an absolute and proprietary right to the use of the trade mark, and he may take proceedings to restrain any infringement of his rights. It is, however, open to an infringer of the mark, if he is sued, to contend that the mark should not have been registered, and to ask that it may be expunged from the Register, but a demand of this character will be successful only if it is made on recognised legal grounds.

Commercial use of a trade mark prior to an application for registration (unlike corresponding prior use of a patentable invention or a registrable design) is not in any way a bar to registration, provided that the prior use has been confined exclusively to the applicant for registration. Indeed, if a trader has exclusively used a trade mark for many years and has established a 'goodwill' in the mark, so that it is widely recognised in his particular trade as indicating goods obtainable from him alone, he can obtain registration of the mark because it has become distinctive of his goods, even although the mark would not otherwise have been capable of registration.

Whilst a patentee is an inventor of a machine or process or of an article of industrial usefulness, an author is a man who 'invents' artistic property, and subject to certain limitations, the author of any literary, dramatic, musical or artistic work has an ownership in his work, termed *copyright*, which gives him the sole right of publication, performance and production. Copyright, governed by the

Copyright Act 1911, endures, as a general rule, for the life of the author and for fifty years after his death, with modified rights in respect of the final twenty-five years. Although there is no copyright in a mere idea, copyright does extend protection to almost everything which is committed to paper, provided it has involved skill and labour and is in some sense original. For example, the compilation of a time-table is the subject-matter of copyright, since it is not only original, but also involves skill and labour. On the other hand, the House of Lords has held that the selection of commonplace memoranda in the forefront of an ordinary pocket diary is not a copyright work. This decision would not apply to a special diary, compiled for a particular purpose, which had involved the preparation and selection of particular data. Copyright also extends to paintings, drawings, charts, plans, photographs, sculpture and architecture, but there is no copyright in an idea.

There is, normally, no copyright in the title of a book or other work. On the other hand, if a work has obtained, or established, a goodwill under a particular title, application may be made to the Court to restrain a plagiarist, if he is seeking to exploit its goodwill by the use of a similar title, or a title so nearly resembling it, as to cause confusion in the minds of the public. An action in such a case is not based upon copyright, but upon 'passing off', and the essence of a passing-off action is the appropriation of another man's goodwill involving him in financial loss. For example, if John Doe publishes a monthly journal, called *The Brown Magazine*, he might be able to restrain publication of another journal called *The Browne Magazine*, if he could satisfy the Court that his journal had established a goodwill under the title of *The Brown Magazine*, and that *The Browne Magazine* was first published after he had established his goodwill, and provided also that the Court was satisfied, by evidence, that the similarity was likely to cause confusion in the minds of the public, and would involve John Doe in financial loss.

Formerly it was necessary to register a work at Stationers'

Hall in London in order to secure copyright. This is no longer necessary, since the author of every original literary work is entitled to copyright in the work, irrespective of registration. Although, however, registration is no longer compulsory, Stationers' Hall still keeps a register of published works which are submitted to them for registration.

Although the author of a work is normally the first owner of the copyright, this is not the case if he produces the work under a contract of service, and as part of, and in the course of his duty to his employer. In that event, the employer is entitled to copyright in the work, unless the service agreement expressly reserves the right to the author. A *contract of service*—i.e., an agreement between an employer and an employee—must be distinguished from a *contract for services*—i.e., an agreement by which one person undertakes to carry out certain specified services in the capacity of an independent contractor. For example, if you write a book at the request of a publisher, you will not be his employee, but your work will be carried out under a contract for services. Difficulty sometimes arises in determining the ownership of copyright in a work which has been commissioned. The parties should, accordingly, deal specifically with this point, when they make their agreement. The same problem may arise in regard to photographs. If a photographer gives a 'complimentary' sitting; he usually retains the copyright in his work, and may publish it as he thinks fit. If, on the other hand, payment is made by the sitter, the latter retains the copyright, and the photographer is not then entitled to reproduce the photograph. As regards letters, the copyright remains in the writer, and the recipient of a letter is not entitled to publish it.

As a general rule, copyright is infringed by any person who produces or reproduces a substantial part of the copyright work, or any colourable imitation of it, in any material form, without authority from the owner. It is, in each case, a question of fact as to whether the infringing material is a substantial part of the work. For example, four lines extracted from a long poem, might in some circumstances

be regarded as sufficiently substantial to constitute a legal infringement. It is not, however, an infringement of copyright to make use of extracts from a copyright work for the purpose of review, or fair criticism, or for the purpose of a newspaper summary.

If copyright has been infringed, the owner has a number of remedies. Foremost among them is his right to apply for an injunction to restrain further infringement, an account of all infringing copies sold, and damages for the infringement. Moreover, copyright being a species of property, both the original and the infringing work are deemed to be the property of the owner of the copyright, and he is therefore entitled to ask for delivery up of all copies of the infringing work and damages for the conversion. This does not mean that a single article in an encyclopædia which infringed copyright would entitle the owner to delivery up of the entire encyclopædia. He would, however, be entitled to ask the Court to order the offending article to be excised, and for delivery up of such excised part.

In the assessment of damages for the infringement, the Court will consider the financial loss, and the loss of reputation, if any, which the plaintiff has suffered. Damages for conversion are assessed upon the same basis as in any other case in which property is wrongfully converted. This means that the plaintiff is entitled to recover, as damages for the conversion, such sums as the infringer has himself received in respect of the infringing matter. Sometimes it is very difficult to assess the amount of this damage. The Court will make the calculation as best it can, after it has taken all relevant factors into consideration. This remedy may sometimes result in a penalty on the infringer which is out of proportion to the damage which the owner has suffered, and if the infringer did not know that he was infringing the author's copyright, it may cause considerable hardship. Possibly with the intention of meeting this hardship, a clause was inserted in the Copyright Act designed to relieve an innocent infringer from any liability for damage. The Courts have held, however, that 'innocent' in this sense does

not mean ignorance as to identity of the true owner of the copyright. It means that the infringer did not know, and could not have been expected to know, that the work was the subject of copyright. For example, if a writer submits a story to a publisher as his original work, which the publisher publishes in good faith, but it transpires that the writer had filched another man's work, the publisher is not entitled to plead 'innocent infringement'. The work, having been submitted to him as an original work, would automatically be the subject of copyright. The publisher's 'innocent' error consists in thinking that the copyright was vested in the contributor, and his ignorance as to the identity of the original author affords no legal relief. In assessing damages for infringement, the Court will take into consideration the quantum of the damage which may have been awarded in respect of the conversion.

An action for infringement must be brought within three years after the date of the publication complained of, and this means three years from the date when the last copy of the infringing work was performed or sold, since every separate performance or sale is an infringement of copyright.

When an author writes a book and is able to find a publisher willing to publish it, he does not usually sell or assign the copyright in the work, although he is entitled to do so. It is the usual practice for an author to license it for publication on agreed terms, and whilst most publishers will offer fair terms, there are a few who will seek to exploit the author. In these circumstances, it is desirable for an inexperienced author to obtain expert advice from a reputable literary agent before he signs a contract for publication, or he may join the Incorporated Society of Authors, which was formed expressly to protect the rights of authors.

If an author writes a book, no one is entitled to write a play, or produce a film based on the book, without his consent. Although publication is in a different medium, the author is nevertheless entitled to restrain the production. Dramatic rights and film rights in a literary work have great potential value, and an author who signs a contract for publication of

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Copyright is infringed not only by copying, but also by performance of a work in public. This is called infringement of the performing right in the work, and it frequently occurs when plays are produced by amateur dramatic societies in village halls. No copyright play or other copyright work may be performed in public without a licence from the author, and 'in public' has been held to extend to a performance given by a Society to its own members, even if no charge is made for admission to see the performance. The decisive test is whether or not the audience is really of a domestic character, and performances in the home, and among the family, or those given by schools from which members of the public are excluded, are usually the only ones exempt from the obligation of obtaining a licence.

At one time it proved extremely difficult to ascertain when a particular work, and more especially a musical work, had been performed in public. A composer would not know every time one of his songs had been sung at a concert. Accordingly, a number of authors, composers and publishers formed a Society called the Performing Right Society, and they vest the control of all their performing rights in this Society, who now make it part of their business to track down infringements. Most authors, composers and publishers of repute are members of the P.R.S., as the Performing Right Society is called, and it controls performing rights by granting licences, which permit the performance in public of the compositions of any of its members or of its affiliated Societies on payment of an annual fee. These fees are then divided among the members of the Society and the affiliated Societies. Broadcasting rights are included in performing rights, and the B.B.C. pays a substantial sum each year to the P.R.S. for its licence to broadcast copyright musical works, as distinct from dramatic rights. The P.R.S. maintain a staff of inspectors who visit theatres, music-halls, concert halls, hotels, restaurants, public-houses, village halls, institutes, hostels, canteens, and other places in which musical performances

are given, either by individuals or by mechanical reproduction such as gramophone records. The Society will require application to be made for a licence in all these cases, and if the owner proves recalcitrant and irresponsible, proceedings may be brought against him to restrain infringement of copyright. Since the public performing rights in most musical works are controlled by the Society, infringements are almost inevitable in such circumstances, unless the performances are confined to music published prior to about 1850, in which case the copyright may have expired.

Moreover, it should also be noted that the P.R.S. has reciprocal agreements of affiliation with all the Performing Right Societies which operate in the British Dominions and foreign countries where copyright is the subject of protection by law. Under these agreements, the English P.R.S. controls in its territory the performing rights in the works comprised in the repertoires of all such Dominion and foreign Societies, and vice versa.

From time to time attempts have been made to argue in the Courts that it is wrong for artistes and performers to be compelled to pay licence fees when they perform copyright work. It is said that the author or composer ought to be grateful for the benefit conferred on him by the publicity which he receives. These arguments have always failed. Publicity doesn't buy provisions, and there is no valid reason why an artiste should refuse to pay for the privilege of making money out of the labour which an author or composer has to expend before his work is brought to fruition and is ready for public performance.

CHILDREN

'She was not really bad at heart,
But only rather rude and wild,
She was an aggravating child.'
Hilaire Belloc

EVERY member of the community is an infant in the eyes of the law, until he attains his majority—*i.e.*, on the day before his 21st birthday. It may be observed, at the outset, that the birth of every child must be registered with the local Registrar of Births within forty-two days of the birth in England, or twenty-one days in Scotland. The registration should be effected either by the father or the mother, or, if they fail to do so, by the occupier of the house in which the birth took place, a person present at the birth, or the person having charge of the child.

Infants enjoy certain legal privileges, and are also subject to a number of legal disabilities. A child under eight years of age cannot be charged with any criminal offence. If it is over eight and under fourteen, it can only be convicted of an offence if it is proved affirmatively to be capable of understanding and appreciating the effect of its actions. A child between the ages of eight and seventeen is legally described as a 'young person', and is not subject to the normal legal penalties for a criminal offence. Moreover, when a child under the age of seventeen is charged with a crime, other than homicide—*i.e.*, murder or manslaughter—it will be brought before a special Court, set up under the Children and Young Persons Act 1933, and known as a Juvenile Court. The atmosphere of a Juvenile Court is intended to be different from that of a Police Court. Although a child ought to learn to appreciate the gravity of breaking the rules of the community—*i.e.*, of committing an offence against the law—it ought to be neither terrified, nor encouraged to despise its social obligations. In the former case it might leave the child with a fear to haunt it through

life. In the latter instance it might accentuate any criminal tendency, and lead the child to a career of crime.

If the Court considers that the home conditions of the child are unsatisfactory, and the child is in need of care or protection, it may make an order which deprives the parents of custody. The child will then be placed under the care and protection of selected foster parents, or officers, called probation officers, who may be directed to supervise its welfare. In the case of conviction for serious offences, the Court may order the child to be sent to an 'approved school'; the object of these schools is to cure the young criminal of his anti-communal tendencies. The extent to which this aim is achieved is uncertain. There are good approved schools, but there are also bad ones, and the latter are more harmful than beneficial.

Juvenile Courts are always conducted 'in camera'—i.e., in private—and the name of any child brought before the Court must not be disclosed. In this way children are protected from the publicity which usually attends crime. It may be hard even for an innocent person to resume his occupation if the spotlight of the press has scorched him. It is infinitely more difficult for a convicted person to make a fresh start in life.

The law has become extremely solicitous for the welfare of children since the beginning of the century, and the passing of the Children Act 1908 paved the way for later reforms. The law not only safeguards children from physical cruelty, by imposing severe penalties for ill treatment, but also displays great regard for their mental and moral welfare. Children are not permitted to beg, bet, gamble or smoke. The law will not allow them to be unduly chastised, for the country has long since decided that 'perpetual flogging is not the best method of imparting knowledge and maintaining discipline'. Reasonable physical punishment may, however, be administered by a parent, guardian, or a schoolmaster to whose care the child is temporarily committed, and in considering whether or not physical punishment has been reasonable, regard must be given to the severity of the offence, and the age and mental capacity of the child. If

excessive physical punishment is administered, the child has the same remedy for assault as an adult.

It is perhaps unfortunate that legal concern for the welfare of children overlooks other methods by which their well-being may be secured.* The present regulations are undoubtedly weak for dealing adequately with 'hard-boiled young devils', and regulations are lacking to fix sufficient responsibility for juvenile delinquency on parents, who are normally the guardians of the children. Lack of parental control, and the indifference of parents, are so frequently the origin of the trouble that the community might benefit if parents were compelled to accept greater responsibility for the criminal activities of their children.

The father is normally the legal guardian of a child under the age of twenty-one, and technically has the right of custody. The father has no legal rights over an illegitimate child, although he may be under an obligation to make payments to the mother for its support, and this liability may be enforced even when the mother is a woman living apart from her husband. Since the Legitimacy Act 1926, an illegitimate child is legitimised by the subsequent marriage of its parents, if the father is domiciled in England or Wales, and if, at the date of the birth of the child, both parents were free to marry.

The mother of an illegitimate child will usually require financial support from the father. She may apply for an affiliation or bastardy order, and on proof of paternity, she may obtain an order against the father for a sum not exceeding 20s. a week, payable until the child is sixteen years of age. If she does not know the whereabouts of the father, or if she is unable to satisfy the Court, by her evidence, that he is, in fact, the father, she will not be able to obtain any legal redress, and will have to support the child out of her own resources.

If the mother wishes to be rid of the responsibility for the child's upkeep, she may find someone who is willing to adopt it, either directly or through the offices of an adoption society. If Mr. and Mrs. John Doe are anxious to adopt a

* See Note, p. 239.

child, and think Fidget a 'little dear', they are not permitted to adopt him until a number of legal formalities have been completed. They are all designed to prevent Fidget from falling into the hands of unsuitable adoptors. An application for adoption may be made in a Court of Summary Jurisdiction, in a County Court, or in the High Court. It was formerly common to reproach an illegitimate child for permitting itself to be born. An illegitimate child is now no longer kept under the counterpane. The law is as solicitous for its welfare, as it is for a baby born in honest wedlock, and a Court will never make an order for adoption until stringent enquiries have been made by one of its own officers into the antecedents and living conditions of the proposed adoptors. The order may, in particular, be refused if the proposal is based upon a financial bargain, by which the adoptors are to be paid for accepting the burden of the child.

To protect the interests of the child to be adopted, the child's mother will have to sign a consent to the adoption, and agree to renounce absolutely and unconditionally any control or rights over the child. The consent is not extracted as a punishment, but because it might be disastrous to Fidget's interests if his parent sought to reclaim him after many years. He may then have come to regard John and Jane Doe as his parents, and their home as his home, for if the order is made, the child loses his original identity, and becomes Fidget Doe for all practical purposes, except as to his rights of inheritance. If his adoptors die intestate, he is not entitled to a share in their estate as one of the next-of-kin; on the other hand, he will be one of the next-of-kin of his mother, and also of his father if he is legitimate, and entitled to share in their estate, if they die intestate, as described in Chapter 26.

The question of a child's custody is bound to arise if the parents quarrel and separate. Although, generally speaking, the father has, as stated, the technical right of custody, it does not always work out this way in practice, for, in the absence of agreement, the mother commits no offence if she

retains possession of the child contrary to the father's wishes. If, as sometimes happens, one parent takes possession of the child from the other parent by a trick, no effective step can be taken to remedy the position, except by an application to the Court. There is a general jurisdiction given to the Police Courts to deal with questions which concern the custody, welfare and maintenance of children, whilst if proceedings for divorce are pending between the parties, and the child is under sixteen, an application for custody may be made to the Divorce Court. It is the usual practice of the Court to allow a petitioner, as the innocent party, to have the custody of a child of the marriage, unless there is good reason for refusal. The welfare of the child is the paramount consideration for the Court. It will sometimes allow the mother to retain the custody, even although she is the guilty party in divorce proceedings, more particularly when the child is very young. Each case is considered on its merits, but the Court is less likely to be induced to make an order in favour of a woman who is living with a co-respondent. If the mother has married the co-respondent, after the conclusion of divorce proceedings, an order for the custody of a young child may be made in her favour, particularly when the father is unable to provide suitable home conditions. The Divorce Court will not, as a general rule, make any order for custody of a child over sixteen years of age.

A child may be made a 'Ward of Court', by commencing proceedings in the High Court to determine questions of custody, or the application of its personal fortune or estate. The custody of a 'pretty young ward in Chancery' is always a matter of concern to the Court, until the child reaches the age of twenty-one. If neither parent is fit to have the care of the child, the Court may deprive both of custody, and make an order in favour of a suitable relative. Disobedience to any order made by the Court is a contempt of Court, which may be punished by imprisonment.

When a child reaches school age, he must attend school, until he reaches the leaving age. Under recent legislation

this is to be raised to sixteen as soon as facilities are available to enable the child to continue its education beyond the present school leaving age of fourteen, to be extended to fifteen in April 1947.

After leaving school, a child is protected by legislation from entering any employment which would subject him to 'sweated labour'. Until he reaches the age of eighteen, a child may not normally be employed for an aggregate of over forty-eight hours in the week, exclusive of intervals for meals and rest. There are many regulations dealing with overtime, meal intervals, half-holidays, night work, Sunday work and welfare, and an employer who infringes any of these regulations may be penalised. The sense of communal responsibility has travelled a long way since a child of five spent its days in the factory, and might be deported for life for stealing a pocket handkerchief.

After a child has left school and has entered employment, there are many restrictions which continue to affect him as a minor, and, subject to certain exceptions, contracts made by an infant are not enforceable against him. When, however, an infant receives, by agreement, services necessary to his station in life it would be inequitable to refuse proper reward to the man who has rendered them. The law will then impose an obligation to pay, because every man is entitled to be paid proper compensation for a genuine service. A child, for example, may enter into a valid and binding contract if it is for the purchase of necessities, or, in certain cases, if it is for its benefit. Necessaries are goods suitable to the condition in life of the infant, and to his actual requirements at the time of the sale and delivery. If an infant enters into such a contract, he may be sued for the purchase price of the goods. The purchase price is not necessarily the price he has agreed to pay. Price limitations and controls were not a war innovation in this instance, for they were enacted by the Sale of Goods Act 1893. By the relevant section, an infant is only required to pay a reasonable price for necessities, and if the trader seeks to recover an excessive price, he will not be able to enforce his claim. By the terms of the Infants Relief Act 1874, contracts

made with an infant for the sale of goods, other than necessities, or for the loan of money, are void and unenforceable. The vendor or moneylender has not rendered a service to the infant, as occurs when necessities are supplied. Indeed, it may be that the trader, or the moneylender, has done the child an injury by indulging his extravagance. An infant is neither legally nor morally required to recognise any obligation in such a case, and the purchase price, or the money lent, cannot be recovered. Moreover, neither the mother nor the father of an infant is liable for any debt which the child may contract, even if it is for necessities.

A certain class of service agreement, such as a contract of apprenticeship, may be enforceable and binding on an infant if it is for his benefit and he derives special advantage from it. The validity of such a contract is dependent upon the facts in each case, and the Court will investigate all the circumstances, declaring the contract unenforceable if it bears evidence of being for the advantage of the employer, without corresponding benefit to the infant. Fidget may have musical talent, and an impresario, or concert manager, may think the child will develop into a brilliant pianist. Naturally, he will not wish to spend time and incur expense training Fidget, if he is not to have any return for his outlay. He may, therefore, ask the child to appoint him as his manager for a stated period of years. If the contract between them requires the manager to give the child proper training, and to find engagements for him, it may well be to the child's advantage. It will then be fair for the manager to receive remuneration out of the earnings, as compensation for his trouble. If, on the other hand, the object of the impresario is to exploit Fidget, as an infant prodigy, or if the contract entitles the impresario to a percentage of the child's earnings, although there is no obligation to train him or obtain engagements for him, the contract may be unenforceable. It would not be to Fidget's advantage, for it would be an attempt by the manager to exploit the child's youth and ignorance, and the law will not permit this to be done.

There are some contracts made with an infant which are not

necessarily good and not necessarily bad. They are called 'voidable contracts', and relate, generally speaking, to those which involve continuing rights and obligations. Voidable contracts were referred to in Chapter 3. If a boy of nineteen enters into a contract to serve an employer in business for a period of five years, without any obligation on the part of the employer to train him in the business, similar to that contained in an agreement for apprenticeship, he may not ordinarily be sued for breach of the contract if he breaks it before he becomes twenty-one. If, however, he continues to give his services under the contract after he is twenty-one years of age, he may then be sued for any subsequent breach. The contract, made during infancy, is voidable on his attaining his majority, and he is then entitled to repudiate it. It is, however, a case of then or never! If he continues to treat it as a valid contract, it becomes binding upon him and he may not later reject it.

When a contract is unenforceable, it cannot be made legally effective, even though the infant promises, at the time of making of the contract, to fulfil his part of the bargain when he attains the age of twenty-one. A shopkeeper may not, therefore, take advantage of a child of eighteen by selling him a gold watch, on condition that he agrees to pay for it on his attaining his majority. The contract will be void, since it is a contract for the sale of goods, and the child may keep the watch without having to pay for it, unless the shopkeeper is able to satisfy the Court that a gold watch was suitable to the infant's condition in life and his actual requirements at the time of the sale and delivery. After the age of twenty-one, a child is, of course, free to make any bargain he chooses, but even then he will not be under any legal obligation if he promises to pay a debt resulting from a void contract made by him during infancy. He will not be liable, because the promise, unsupported by consideration, involves no legal obligation.

It follows from these restrictions that, although it is not inherently illegal, it is not easy for an infant to set up an effective business on his own account. Business involves

contracts, and anyone under the age of twenty-one will find it difficult to find business men willing to trade with him, when his contracts may be unenforceable. Another disadvantage from which he would suffer would be his difficulty in operating a banking account. The relation between a banker and his customer, as we have seen in Chapter 9, is based upon contract. A banker does not like to open an account for a customer who is not responsible for his contracts. The banker will therefore usually refuse to keep an account for an infant.

Fidget may consider it a hardship not to be able to set up his own business, but there is no remedy for these legal disabilities. He probably will not appreciate that it is to his advantage, that restraint should be imposed on his commercial operations. It is not easy to master the elements of any trade without experience, and operating a business successfully is not child's play. It usually requires knowledge of the particular trade, and of markets, together with experience of organisation, office routine, and accounts. A child will not often be skilled in these subjects before he is twenty-one, and most greenhorns come to grief early in their business career. A man will be able to organise his business with better prospects if he is backed by knowledge and experience after repeated trials and errors. These are more certain keys to success than intuition.

Although a child has this freedom from liability in respect of contracts, he is not absolved from responsibility if he commits a tort. He may be sued for damages arising from any negligent act which he commits at any time after he is old enough to understand and appreciate the reasonable and probable result of his actions. This is a question of fact in each case, but as boys and girls under twenty-one are seldom wealthy enough to meet claims for compensation based on negligence, it may not often be profitable to sue them. If a youth, aged eighteen, is cycling and he negligently knocks down and injures a pedestrian, the pedestrian must hope that the cyclist is insured. Otherwise it is improbable that the child's financial resources will justify the

expense of litigation. On the other hand, if John Doe, Jr., aged eighteen, induces a jeweller to sell him a gold watch by fraudulently representing to him that he is over twenty-one, there might be a criminal claim against him for obtaining goods by false pretences, but the jeweller could not sue for damages for the tort of fraud, as this would be an indirect method of trying to enforce the contract.

A further disability suffered by an infant is his inability to make a will, for no will made by an infant is valid, unless it is made when he is in one of the armed forces on active service, or a seaman at sea. Otherwise his fortune, if any, on his death, will revert to his next-of-kin—a subject dealt with in Chapter 26.

Finally, John Doe, Jr., may seek to enlist sympathy for his inability, until he attains his majority, to qualify as a Member of Parliament, to fill any public office, to vote at an election, or to enter any of the learned professions—not excepting the law!

NOTE

The Curtis Committee set up by the Home Office to enquire into existing methods of providing for children who, from loss of parents or from any other cause, are deprived of a normal home life, published its report in October 1946. It reveals the fact that there are 124,900 children deprived of a normal home life in this country. Many of these are living in Institutions run on lines which would have been antiquated fifty years ago. Recommendation (which will require legislation) includes compulsory registration of all homes in which children are boarded voluntarily, and approval of all foster homes, a tightening up of the regulations which relate to the adoption of children, periodic visits to all foster homes by specially trained visitors, a family group system in cottage homes, and generally closing of present loopholes which allow children to be brought up in unsatisfactory surroundings.

BREACH OF PROMISE, MARRIAGE AND ALIMONY

"Come, come," said Tom's father, "at your time
of life,

There's no longer excuse for thus playing the rake.

It is time you should think, boy, of taking a
wife——"

"Why, so it is, father—whose wife shall I take?"

Thomas Moore

It is unromantic to record that the breach of an agreement to marry has the same legal consequences as every other broken contract. An arrangement which should be emblazoned with chivalry does not differ in its effects from a cold bargain between two hard-headed business men. Judges must administer the law, but they do not, as a rule, like the flavour of an action for breach of promise of marriage. It does not reflect twentieth-century ideas of citizenship. When time brings a change to sentiment, it seems harsh for a young man, or a young woman, to be faced with the alternatives of a wrecked life, or an action for damages.

The essential legal features of an engagement to marry are an unconditional offer and acceptance of the offer of marriage. Consideration is implied by the mutual agreement to enter into the married state. When the contract is broken, the injured party may sue in respect of the breach, provided there is corroborative evidence of the engagement, and the damages will be the financial expense incurred in contemplation of the marriage, together with a sum reasonably calculated to be the value of the lost marriage. If the engagement has been a long one, and the girl claims to have devoted what are described as 'the best years of her life' to the proper contemplation of matrimony, the damages may be substantial. Similarly, if the man is wealthy, and, as a result of the breach, the girl has lost a good 'bargain', the damages are enhanced, and she may be adequately rewarded by the Courts. If the woman wishes the world to know that her fiancé might have

called her 'O Mistress mine', she may also be awarded compensation for the loss of her chastity. On the other hand, if an engagement, made one night in an excited outburst of emotion, is broken with the dawn, when sanity returns, the aggrieved lady will not receive the same reward for her distress, for she will not really have suffered any loss. Nor will she receive much financial encouragement if her action is prompted by revenge. In other words, a girl may be awarded substantial damages if the man has behaved like a cad, but she will, as a rule, receive little reward when there have been no aggravating circumstances, and the man has behaved honestly, in refusing to contract a marriage which would be doomed to failure from the outset. When a man is rash enough to institute an action for breach of promise, he should not expect to receive much sympathy or compensation from the Court. It is always open to him to seek elsewhere for 'the endearing elegance of female friendship', and his real loss will be loss of pride, unless he was making a money match, and that will never gain him sympathy in Court.

You may be married when you are sixteen years old, but if you marry under the age of twenty-one, you must first have the consent of your parents or guardian, or, if this is refused, the consent of a police magistrate.

When you wish to be married, there are various ways in which you may make your 'Appointment with Fear'. If the ceremony is to take place in a church, it will either follow the publication of banns, or the issue of a licence. The clergyman who officiates at your church will make the necessary arrangements for banns, for a fee of 15s., but the total cost of the ceremony will depend on the contribution you decide to make to the officiating clergyman, and the expense you incur in supplementary celebrations.

If you wish to marry by licence, there are two types, called an 'ordinary licence' and a 'special licence'. An ordinary licence applies to a named church, and is valid for three months. It will be issued only after personal application by either party who has had his or her usual place of residence for fifteen days in the parish of that

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church. Your vicar will furnish you with the address of the nearest office at which your application may be made. The cost is about £2. A special licence is, normally, issued only in an emergency, when the ceremony has to be performed without delay. It costs £25 and can be obtained only through the Faculty Office of the Archbishop of Canterbury, after conclusive evidence of the emergency.

A Registry Office marriage may be effected either by certificate or by licence. In the former case, either party may make personal application to the local registrar of marriages for each of the districts in which they have been respectively residing for at least seven days prior to the application. This involves two certificates, if the parties reside in different districts, and they will be issued after the expiration of twenty-one clear days, if no objection has been raised. Each certificate is valid for three calendar months from the date of the original application. The fee payable when the parties reside in different districts is 9s. It is 7s. when both reside in the same district.

If the marriage is to be by licence, only one notice is necessary, instead of the two notices required in the case of a certificate. A fifteen-day residential qualification is essential, and, either the parties must both live in the same registration area, or one must reside in the registration area in which the notice is given, and the other must reside in England or Wales. The licence may be issued at the expiration of one clear day, in the absence of any objection, and it is valid for three months from the date of application. The fee payable for a licence is 5s.

Before the passing of the Married Woman's Property Act 1882, the wife, after marriage, possessed few legal rights. Her property, in the absence of a marriage settlement, automatically became her husband's property, and she was deprived of most of her powers to enter into a contract. The marriage settlement, now little more than a faded memory, was usually regarded as an essential preliminary to middle and upper-class marriages. From the husband's point of view, the capital monies settled on trustees, for the benefit of the wife, were

intended to be a financial inducement which lightened the burden of supporting a wife. The wife, on her side, gained security from the settlement, as she was entitled to receive the income from the Trust Funds—but not to spend it in anticipation—for her own use and benefit. A dishonest or spendthrift husband was, moreover, prevented from obtaining control of and wasting his wife's capital. Marriage settlements have, however, been out of fashion since successive Acts of Parliament have helped to create modern woman and her privileges.

To-day every wife has substantially the same rights as her husband. She has, for many years, been able to own property, and also to carry on her own business, whilst the Law Reform (Married Women and Tortfeasors) Act 1935 entitles every woman to enjoy the privileges of bankruptcy—a reward for insolvency previously reserved solely for women who had carried on a trade or business of their own.

Wedding presents of a married couple, other than purely personal presents, are joint property after marriage. This means that neither of the parties may dispose of them without the consent of the other. In the event of separation or divorce, and unless the parties are able to reach an agreement on division, the only practical course is to agree to their sale, and an equal division of the proceeds of sale. They may not, however, be sold without consent of both parties, and the result is a deadlock, if one of the parties refuses to agree.

A wife is entitled to receive financial support from her husband, and if he fails to give her this support, she is entitled to pledge his credit, to enable her to purchase the necessities of life. When compelled to resort to this method of acquiring her daily bread, she is known in law as an 'agent of necessity'. In this capacity she is entitled to purchase nothing beyond actual necessities. She is not, however, entitled to contract as an agent of necessity, if her husband is making her an allowance adequate to his means and their station in life. There is no exact definition of 'necessaries'. It depends on the husband's social and financial status, and other surrounding circumstances.

When a husband pays his wife a fixed sum each week for housekeeping, any money left over at the end of the week belongs to the husband. It cannot be retained by the wife for her own benefit, and if she saves some of it week by week, the Court may order her to repay all the savings to the husband if he sues her, because she has received the money as his agent, and it has never assumed any character other than money paid to an agent for the use of the principal. If, on the other hand, the husband makes the wife an allowance, and she undertakes to pay housekeeping bills out of the agreed allowance, the balance may belong to her. Whether the money is paid to the wife for her own personal use, or as an agent for the husband, is a question of fact in each case. In the former event the wife may retain the money; in the latter event she must return it on demand.

When husband and wife are living together, the wife will, generally speaking, be regarded as her husband's agent when she buys goods for the household. She is her husband's agent because it is customary for a married woman, living with her husband, to 'do the shopping', and it is therefore within the scope of her implied authority to purchase goods for her husband's account. The husband will, accordingly, normally be liable for the bills he receives for purchases of household goods, even although they do not fall within the description of 'necessaries'.

A husband sometimes inserts an advertisement in a newspaper to say that he will not be responsible for his wife's debts, and that she has no authority to pledge his credit. This does not affect his legal obligation to his wife. If he is making his wife a proper allowance, he is not responsible for her debts, but if he is not doing so, he may be sued in the circumstances which have been specified.

When a husband fears that his wife is likely to pledge his credit after they are living separate, and she is in receipt of a proper allowance, it is prudent for him to notify every shop with whom he has opened an account that his wife no longer has authority to purchase goods for his account. Otherwise he may be liable to pay for goods purchased

by his wife, unless he can satisfy the Court that the vendor knew, or ought to have known, that, for some proper reason, his wife's implied authority had been revoked.

Since the passing of the Law Reform (Married Women and Tortfeasors) Act 1935, a husband is no longer liable for his wife's torts or civil wrongs. If, accordingly, his wife calls a neighbour a 'thief', the husband cannot now be joined, as a defendant, in proceedings instituted by the neighbour to recover damages for the slander. For the same reason, the husband will not, normally, be liable if a wife driving her own car, on her own business, negligently knocks down and injures a pedestrian. He will, however, be liable if she is driving on his business, as in that event she is his agent, and the ordinary law of agency is applicable.

If a wife is deserted by her husband, and he leaves her destitute, she has alternative ways of obtaining financial relief. She may take out a summons in the Police Court for maintenance. The power of the Police Court to order maintenance is, however, limited, and the maximum sum it may order the husband to pay is only £2 a week, with a further sum of £1 a week for each child under sixteen. If the husband is wealthy, this allowance is, of course, substantially less than her legal due, and she will therefore usually prefer to avail herself of her right to apply to the High Court. The High Court has no power to entertain the request, however, except as ancillary, or supplemental, to some other application affecting the married status. If no grounds exist for a divorce—a subject considered in the next chapter—a wife is, accordingly, compelled to apply for a decree, called 'restitution of conjugal rights'. A wife is always entitled to require her husband to render her 'conjugal rights', unless her conduct has been such as to afford her husband adequate excuse for refusal. 'Conjugal rights' means shelter and the right of her husband's society, and upon the husband's default the Court may make an order, which theoretically requires him to comply with his obligations. Although it might often be more agreeable for a wife to apply for a divorce on the ground of desertion,

she cannot take this step unless the desertion has lasted for a minimum period of three years. As it is not a practical proposition to live for three years on credit, a wife must, accordingly, in appropriate cases, fall back upon her prayer for restitution. It is the only peg upon which she is able to hang her claim for alimony. When she takes the proceedings, her troubles are not necessarily at an end, however, for she must satisfy the Court that her petition is sincere, and, unless she is able to do this, she is not entitled to a decree. If she says in her evidence that she was delighted when her husband decided to leave her, and please, will the Court order him to carry out his proper legal obligation to support her, the Court will refuse her prayer, because her plea for restitution of conjugal rights is not sincere.

This archaic procedure exposes the law to ridicule; the more so, since a husband will almost invariably snap his fingers at an order for restitution, after it has been made. He will flout the authority of the Court because he will have been advised that the Court will never require him to obey the order. He will know, that so long as he complies with the ancillary order for alimony, he will not be disturbed. On other occasions, refusal to comply with an order of the Court is a contempt, which is punished by imprisonment, but a Court will never compel a husband to return to his wife. Why does the law suffer itself to be brought into disrepute in this way? The question may be properly asked, but it is doubtful if anyone could be found who would be able to give a reasonable answer.

Since a husband who has left his wife will have nothing to gain from restitution proceedings brought by her, and they will always involve him in substantial expense, it will be more prudent for him to make an amicable agreement to pay her a fixed allowance. No Court proceedings will then be necessary, and if the husband subsequently makes default under the agreement, the wife may sue for the amount due, or for damages for breach of contract. The wife must, however, be careful, if she enters into such an arrangement, not to record any agreement to live separate from her husband, for if

she does so she will be barred from bringing proceedings for divorce based on desertion at the expiration of three years. A mutual agreement to separate is an absolute bar to a divorce on the ground of desertion, since the essence of desertion is a withdrawal from co-habitation, without cause, and against the wishes of the petitioning spouse.

The law treats marriage as a contract to which certain essential conditions are attached. On the breach of any one of these essential conditions, the other party may claim that the contract has been repudiated, and in due course may apply for the marriage to be dissolved. Unlike a business contract, the agreement may never be terminated by mutual consent. There is no more certain way of tightening the marriage bond than by husband and wife entering into an agreement to bring it to an end. Such an agreement, which will be considered in the next chapter, is known as a 'collusive agreement', and it is an absolute bar to a divorce.

Divorce generally will, as stated, be considered in the next chapter. Here we may observe that a wife is always entitled to apply for financial support when she presents a petition either for divorce or for a judicial separation, as well as when she applies for a decree of restitution of conjugal rights. So long as the marriage tie exists, the allowance which a husband may be ordered to pay to his wife is called 'alimony', except after an order for restitution of conjugal rights when the order for the allowance is called an order for 'periodical payments'. After the marriage has come to an end it is called 'maintenance'. There is an erroneous belief that a wife is entitled to a third of her husband's income when she receives alimony or maintenance. There is, in fact, no hard-and-fast rule, but, in general, a wife is entitled to one-fifth of the *joint* incomes by way of alimony '*pendente lite*'—i.e. pending suit—and to one-third of the *joint* incomes after a final decree has been made. This means that if a wife is earning her own living, or has any independent income, the amount of her income must be taken into account before calculating the amount of the husband's obligation. For example, if a husband is earning £600 a year, and his childless wife has an income of

£150 a year, she will not, usually, be entitled to any alimony *pendente lite*, as she is already in receipt of one-fifth of the joint incomes of £750. The proportion of one-fifth is, of course, a low one. It is based upon the theory that the wife is entitled to a bare minimum for her support, pending the disposal of the litigation. It is only after a final decree that the wife's permanent rights are assessed, and when a husband is ordered to pay maintenance after a decree of divorce, he may also be ordered, if he has capital, to make a settlement, which will secure part of the maintenance ordered to be paid. No settlement may, however, be ordered if there has been a judicial separation, as distinct from a divorce, but in that event the wife may have certain legal rights after her husband's death, under the Inheritance (Family Provisions) Act 1938, considered in Chapter 26. A divorced wife has no rights under that Act.

Every order for maintenance, or alimony, will usually direct payment for joint lives or 'until further order'. This means that the payment must be continued until either the husband or the wife dies, unless there is any substantial change in the financial position of either party, when the Court has power to vary the amount payable. Even if the wife has remunerative employment when the final decree is made, and she does not require immediate financial support, she must make an application to the Court for an order for maintenance, if she wishes to safeguard her future rights. Unless her application is made within a month of the final dissolution of the marriage, she will only be able to obtain an order at a later date if she satisfies the Court that there were exceptional circumstances to explain her default in not making her application at the proper time. When, however, she is not in a position to ask for any substantial maintenance, the Court may make an order for a nominal allowance of 1s. a month. This gives her the right to apply for an increase if her financial position deteriorates, and she is later left either with a reduced income or with nothing at all.

If the husband is paying maintenance to his divorced wife under an order of the Court, her subsequent re-marriage is

not, automatically, a ground upon which the order may be discharged or varied. It may be necessary for her former husband to prove that her financial status has improved, and that she is in receipt of an income, as a direct result of the second marriage, and unless he is able to do this he may not, necessarily, be able to obtain any modification of an existing order.

In calculating the sum which a husband may be ordered to pay his wife, no allowance is made in respect of income tax, and all the figures are computed on a gross basis. After the order has been made, however, the husband may ordinarily deduct income tax at the full standard rate before he makes each payment, unless the gross amount payable does not exceed £2 per week. If, accordingly, he is ordered to pay to his wife £20 a month, he will, in fact, pay her only £11, when the current rate of tax is 9s. in the £. He must, however, sign and give his wife a certificate, on the appropriate Revenue form R185, as evidence of deduction of the tax, and to enable his wife to recover from the Revenue any balance due to her, after computation of her own liability for tax.

The calculations made on the one-fifth and the one-third basis, respectively, apply only to maintenance for the wife for her personal use. If there are children of the marriage, in the wife's custody, the husband may be ordered to pay additional sums for their maintenance. There is no rule upon which to calculate this additional amount. The general principle is that the children must not be allowed to suffer by reason of the dispute between the parents. The Court will normally order such a sum to be paid by the husband for each of the children of the marriage as will enable this intention to be carried into effect. Regard must be had, however, to the maximum sum which the husband might reasonably have been expected to pay for the children's maintenance, education, and support, if the marriage had not been broken up.

When a wife is the respondent or defendant to a divorce suit, she is usually entitled to apply for alimony *pendente lite*, in the same way as a petitioner. Since everyone is assumed by the law to have observed his or her legal obligations, a

wife charged with a matrimonial offence is deemed to be innocent of the accusation, until her guilt is established. The husband therefore cannot normally resist an application for alimony *pendente lite*. He may, however, do so when he is able to satisfy the Court that his wife is, in fact, being maintained by a co-respondent. When the husband has obtained a divorce decree, he is no longer compelled to support his wife. As soon as adultery has been proved, she forfeits her right to financial support.

If an order for maintenance, or alimony, is not obeyed, an application may be made for its enforcement. Unfortunately, the legal machinery for enforcing such orders is slow and cumbersome. If the husband wishes to flout his obligations, and proves obstructive, the wife's lawyer may have a hard task. Frequently, if the husband is clever, the lawyer's efforts may prove abortive. A wife may regard a husband who fails to support her as a criminal. The law does not take the same view, and it is not easy to obtain an order to commit a man to prison when he ignores an order for payment of maintenance or alimony. Sometimes, indeed, it may be more advantageous to a wife to make the best of a bad job and set to work as she would do if her husband had died a pauper.

Police Courts have more extensive powers of enforcing their orders than the High Court. Moreover, Police Courts have power to make orders for maintenance on the ground of cruelty and neglect, as well as on the ground of desertion, and failure to maintain; greater recourse would probably be had to them if their jurisdiction were extended to enable the wife to obtain orders for maintenance in excess of 40s. a week.

If, however, there are husbands who default, the majority recognise their financial obligations, even after divorce. It must also be remembered that although there are many virtuous wives, there are others who are only fit to be the 'mothers of dead dogs'. No law can be fair to all. In most respects the present rules for financing the wife are adequate to meet the normal, as distinct from the exceptional, case.

DIVORCE

"Fy! Madam, do you think me so ill-bred as to love a husband?"

Love in a Wood, Wycherley

It is a fair guess that many readers will open the book at this chapter. If you are one of them, I hope you will immediately turn to the dedication which precedes the preface, in order to become one of those to whom the book is dedicated.

The principal grounds upon which a divorce or a judicial separation may be obtained are: (1) adultery, (2) cruelty, (3) desertion for three years or upwards and (4) incurable lunacy of at least five years' duration. A decree of nullity of marriage, as distinct from a divorce, may be obtained if the marriage has never been consummated either on the ground of physical defect of one of the parties, or by reason of wilful refusal to agree to the consummation. The marriage may also be legally annulled, by decree, if it was, in fact, null and void from the outset, as, for example, when the ceremony was bigamous or had been celebrated between relatives within the prohibited degrees, or when one of the parties was under sixteen, the legal age permitted for marriage. A marriage may also be annulled on the ground that either party at the time of the marriage was of unsound mind, or that the respondent or defendant was, at the time of the marriage, suffering from venereal disease in a communicable form, or pregnant by some person other than the petitioner, and this fact was unknown to the petitioner.

There are scarcely any other grounds upon which a marriage may be terminated. Incompatibility of temperament is never a ground for divorce, and if husband and wife quarrel over trivialities, and irritate each other beyond all reason, their only alternative to 'gnawing domestic misery' is to agree to separate by mutual consent. No petition for divorce may be presented to the Court to end such

a marriage, whilst a separation agreement, as stated in Chapter 24, will bar any future divorce based on desertion, although not one founded on adultery.

Cruelty required to support a petition for divorce may be either physical or mental. *Physical* cruelty consists of calculated acts of physical violence which are dangerous to life or health. Continuous nagging, or constant abuse or neglect, which results in injury to health or causes fear for physical safety or health, may amount to *mental* cruelty. It is a question of fact whether the behaviour of the offending spouse reasonably deserves this description. For example, petty squabbling, for which each spouse may be partly to blame, is not cruelty. Insulting conduct may, however, amount to cruelty, if the effect is to cause injury to the other spouse's health.

Sometimes there may be insulting conduct by one or other of the spouses which may not amount either to physical or mental cruelty because there is no injury to health. The other party may, nevertheless, be justified in leaving the matrimonial home. The legal position in these cases is not satisfactory. Although the marriage is broken up neither party has any immediate legal remedy. It is an example of what is known in law as 'constructive desertion', and no proceedings for divorce on the ground of desertion may be started unless and until there has been an uninterrupted period of desertion for three years immediately preceding the presentation of the petition for divorce.

As an illustration of 'constructive desertion' there is the case when a husband brings another woman into the house, to take precedence over his wife. She need not then remain. The husband's obligation is to provide a home for the wife, and to treat her as a wife, and he is not entitled to relegate her to the position of a housekeeper or domestic servant. If he does so, the wife may leave him, and commence proceedings three years later for a divorce on the grounds of desertion, unless her husband has repented in the meanwhile, and has given his wife a sincere assurance that she will have no further reason to complain.

The party who seeks the dissolution of the marriage is called the 'petitioner', and the other party the 'respondent'. In a suit by a husband based on adultery, the other man is called the 'co-respondent'. When the wife is the petitioner, and she charges her husband with adultery, the other woman is called the 'woman named'. The respondent and the co-respondent, or the woman named, must each be served with the petition. Respondent and Co-respondent then have the right to appear and defend, but the woman named may, as a rule, only do so after she has formally obtained leave from the Court.

Divorce proceedings cannot necessarily be brought in England merely because a matrimonial offence is committed here. Before the English Courts have jurisdiction to entertain the suit, it is normally necessary for the petitioner to prove that he or she is 'domiciled' in England, and that the marriage was celebrated at least three years prior to the date of the petition. Domicil is not the same as residence or nationality, although, ordinarily, the country in which a man is born is his domicil of origin, and a British woman who marries an alien loses her British nationality, and assumes that of her husband, unless he is a stateless person or unless, under the laws of her husband's nationality, she does not automatically acquire his nationality on marriage. In some cases she has power, however, to regain her British status, if the marriage is subsequently terminated; particulars may be obtained from the Home Office. In the case of an English-born resident, English domicil may be assumed as a matter of course. When, however, a petitioner for divorce, although not of English birth, seeks to establish English domicil, he must satisfy the Court that he has abandoned his domicil of origin, and intends to make England his permanent home, before his petition can be entertained.

Subject to a few exceptions, the wife must take the same domicil as her husband. It is her duty to live with her husband, wherever he may reside, and it would therefore be illogical to allow her an English domicil if her husband were of foreign domicil. An exception is made in favour of a

deserted wife, if her husband abandons his English domicil, and assumes a foreign domicil, after the date of desertion. In that event, proceedings for divorce, based upon desertion, may be brought by the wife in England. The Matrimonial (War Marriages) Act 1944 has extended this right to certain war marriages. In these cases the Court may hear a petition for divorce, subject to certain conditions, if either the husband or the wife was domiciled in England immediately prior to the marriage ceremony. This legislation was enacted to remedy the plight of an Englishwoman, after the breakdown of her marriage to a member of the Allied Forces not normally domiciled in England. Prior to the passing of this Act she had been left without redress in England.

The provisions of the Matrimonial Causes Act 1937, which do not normally permit the presentation of any petition for divorce until three years have elapsed after the date of the marriage, are not to be confused with other provisions of the same Act, which prescribe three years as the minimum period of desertion required to support a petition for divorce based on that offence. No proceedings for divorce may ever be initiated until three years after the date of the marriage, unless leave to present the petition has been obtained from the Court. Such leave may be obtained only when the case is one of exceptional hardship suffered by the petitioner, or exceptional depravity on the part of the respondent, and a heavy burden is imposed on a petitioner who seeks to establish a case on either of these grounds. If, however, leave is granted, the petitioner may bring the proceedings, and prove the case, in the same way as in any other suit. The three years' limitation, however, does not apply to proceedings either for nullity of the marriage, or for a judicial separation, as distinct from divorce, nor does it apply to cases in which proceedings are brought under the Matrimonial (War Marriages) Act 1944.

A judicial separation may be obtained on the same grounds as a divorce. It is an order from the Court which relieves the petitioning spouse from the obligation of co-habitation. There is normally no advantage to either party in obtaining

such a decree, for it leaves the marriage a skeleton, and divorce is the natural sequence to a broken marriage. There are, however, occasions when conscience will not permit a wife to ask for a divorce, and she is not compelled to do so. Moreover, since the passing of the Inheritance (Family Provisions) Act 1938, referred to in Chapter 26, a wife, judicially separated from her husband, may have a claim against his estate for maintenance after his death, although no similar right will accrue to a divorced wife.

In proceedings for divorce based on adultery, it is necessary for the petitioner to prove at least one specific act of adultery, even although the suit is not defended. Sexual fidelity is an essential obligation of marriage, and breach of the obligation must be strictly proved, even in an undefended case, as the Court will not assume adultery has been committed merely because the respondent does not appear and defend the proceedings. Evidence of the parties having been seen in bed together is regarded as sufficient to establish adultery, but if such direct testimony is not available, the evidence brought before the Court must be more than sufficient to arouse suspicion. The Court may, however, infer adultery if strong evidence is given both of 'inclination' of the parties towards each other, and also of 'opportunity' when adultery might have been committed between them. It may be asked to grant a decree, if witnesses depose to acts of gross familiarity between the parties, and also frequent close association, on occasions when adultery might perhaps have been discreetly committed. The Court is, however, alive to current freedom of behaviour between the sexes, and will be slow to draw an inference of adultery unless this may be fairly and reasonably drawn after the whole of the evidence has been reviewed.

'Hotel evidence', as it is called, is the evidence which is frequently supplied by husband to wife, or vice versa, when one of them is anxious for a divorce. The husband may send the wife an hotel bill, showing that he has stayed the night with another woman, and when inquiries are instituted, evidence

is usually obtained which confirms this. When the case is tried, a chambermaid or a waiter generally gives evidence that he saw the husband in bed with the other woman.

In all proceedings for divorce it is usually essential to have a witness who is able to corroborate the evidence given by the petitioner, even if the suit is not defended. The Court is always reluctant to act on the bare confession of a respondent in cases of adultery, and when a petition is based on cruelty or desertion, it is slow to grant a decree if there is no evidence to confirm, in some measure, the complaints of the petitioner.

Although husband and wife must not make any agreement for a divorce, there is no legal objection to a letter being sent by the husband to the wife *after* he has committed adultery, in the hope and expectation of his wife then taking action. The wife will, however, be committing an offence if she has told her husband that, if he will commit adultery and will provide her with the evidence, she, on her part, will commence divorce proceedings against him. If she does this, the agreement is known in law as a collusive agreement, and collusion is an absolute bar to a divorce. It may sometimes be necessary to distinguish between a promise and a threat. For example, if the wife thinks she is in love with another man, and proposes to spend a week-end with him, her husband might say: 'If you go off with Bill Carefree, I shall divorce you'. If that is construed as a threat, the law will regard it as praiseworthy. If, on the other hand, the same words are interpreted as an invitation to the wife to obtain her freedom by committing adultery, and if, in fact, she accepts the invitation, and spends the week-end with Bill Carefree, the parties commit the offence of collusion. The sequel may be disastrous to both, for when a divorce petition is presented, it must be accompanied by an affidavit, sworn by the petitioner, that there is no collusion between the parties. If the oath is untrue, and the Court subsequently ascertains that there has, in fact, been collusion, not only will the decree be refused, but the petitioner may be charged both with the offence of

perjury—*i.e.*, deliberately swearing a false oath—and also the offence of attempting to pervert the course of justice. A sad sequel to an unhappy marriage.

When a divorce decree is granted, the dissolution of the marriage is accomplished in two stages. The first is complete when the Court has heard the evidence and has pronounced a decree, called a decree *nisi*—the Latin word meaning 'unless'. The marriage may be brought to an end six weeks later, when a decree absolute may be pronounced, subject to certain formalities, 'unless' in the meanwhile there has been an intervention in the proceedings by a third party, to show cause why the decree should not be made absolute. When an intervention is entered, the intervener is usually a Government official, called the King's Proctor. It is his duty to investigate the bona fides of petitions for divorce. He is required to play the rôle of detective, and ascertain if the true facts have been presented to the Court. The King's Proctor is, for example, compelled, by reason of his office, to intervene in order to ask for the decree *nisi* to be rescinded, if he finds that husband and wife have brought the proceedings by mutual agreement. It takes all sorts to make a world, and the function of the King's Proctor is accepted by lawyers and the community without enthusiasm.

The usual period allowed to the King's Proctor in which to make his enquiries and intervene in the Suit is the six weeks between decree *nisi* and decree absolute. This period may be abridged, or shortened, by the Court, in special circumstances—*e.g.*, if one of the parties is expecting a child and wishes to marry before its birth, in order that it may be legitimate. Expectant mothers may always ask for leave to go to the head of the queue. Although the Court has power to abridge the time, it will not, however, do so without the consent of the King's Proctor. In practice, the King's Proctor is quite human, and in suitable cases he will assist the parties to bring about the desired result.

Collusion is not the only bar to a divorce.

If one party forgives the other for any matrimonial offence, and there is a reconciliation, or 'condonation'—*i.e.*, forgive-

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ness of the offence—the innocent party is not entitled to decide at a later date to start divorce proceedings, based upon any incident which has been forgiven. Condonation, like collusion, is an absolute bar to a divorce. If, however, at a date subsequent to the condonation another matrimonial offence is committed by the party previously at fault, it will revive the earlier offence, and the innocent party may then take proceedings based upon both offences.

Collusion or condonation may always be pleaded as a defence to a petition for divorce. The respondent to a divorce suit is also entitled to plead, by way of defence, that the petitioner has ‘connived’ at the offence with which he is charged. If a wife encourages her husband to spend a week-end in the country with a girl friend, she is not entitled to complain to the Court if he commits adultery during his leave of absence. She will be said to have ‘connived’ at the adultery—*i.e.*, she has encouraged it by her conduct. Connivance need not necessarily be direct encouragement. The behaviour of the complaining party may amount to tacit acquiescence. It is connivance for a petitioner to stand by in silence when a prudent spouse, anxious to prevent adultery, would take some step to prevent it. Conduct ‘conducting’ to adultery is another bar to a divorce. If John Doe treats his wife in so callous a manner as to throw her into the arms of Richard Roe for protection, and she subsequently commits adultery with him, she may plead that her husband’s conduct has ‘conducted’ to the adultery, and if the Court accepts her evidence, her husband will not obtain the divorce.

The person against whom the decree is granted is colloquially called the ‘guilty party’. The law assumes the other party to be innocent, but if, in fact, he or she is not entitled to a badge of innocence, the decree may be refused. Adultery by a petitioner does not, however, operate as an absolute bar to the divorce; it is called a ‘discretionary’ bar. In ordinary circumstances the Court might not, of course, know of any adultery which may have been committed by the petitioner, when the petition is not defended.

To guard against 'deception', the Court requires a petitioner who has committed adultery to make a full confession and disclosure of his offences. When this has been done the petitioner is entitled to apply to the Judge who hears the case for the exercise of the Court's discretion in his or her favour. In order that there may be no misunderstanding about this particular matter, the Courts have imposed the duty on the solicitor who acts for the petitioner to ask his client (as delicately and as tactfully as he pleases) whether he or she has or has not been guilty of adultery.

There are certain saving graces about this distasteful practice. Although the petitioner must make the disclosure, the confession is lodged in Court, after signature, in a sealed envelope, and it remains there until it is placed before the Judge when he hears the case. The contents are not divulged, and it is not the practice to make any reference in Court to the name of any party mentioned in the discretion statement.

When both parties have committed adultery, John Doe may present a petition for divorce against Joan Doe, alleging adultery by her with Mr. Careless, and Joan Doe may file an answer, denying the charge, and asking for a divorce against John Doe on the ground of his adultery with Miss Carefree. Both parties may deny the allegations, and at the same time ask for the exercise of the discretion of the Court. The Court will then usually tend to exercise its discretion in favour of the party who has had the lesser responsibility for breaking up the marriage. It must not be thought that the exercise of discretion by the Court in favour of an erring party is automatic. Every case is considered on its merits. Provided, however, the petitioner expresses sincere regret for the adultery, and there is a reasonable excuse for the lapse, and so long as it is consistent with public interest, the Court will usually adopt a benevolent attitude. It will do so on the assumption that full disclosure of the facts has been made by the party who asks for clemency. Little sympathy will be shown if it is ascertained at a later date, and after enquiries have been made by the King's Proctor, that the petitioner has not been frank

with the Court. It should also be noted that the petitioner is not entitled to commit adultery after the date of the presentation of the petition, or even after the decree *nisi* has been granted.

If either party later wishes to re-marry, it is necessary to produce a certificate of the decree absolute which has been obtained. No Registrar may perform a subsequent marriage ceremony unless he is satisfied of the dissolution of the earlier marriage. The production of the certificate is the most satisfactory evidence of the validity of the dissolution.

If a man or a woman goes through another ceremony of marriage whilst the first marriage is still in existence, the crime of bigamy is committed. It is a defence to a charge of bigamy that the defendant had not heard of the husband or wife, as the case may be, for a period of seven years, and had no reason to believe he or she was alive or, alternatively, that he, or she, had a reasonable and bona fide belief in the death of the other. Any such defence does not, however, make the second marriage a valid one, and any children of the second 'marriage' will be illegitimate. The Divorce Court has power to make an order presuming the death of a spouse, where reasonable grounds exist for believing him or her to be dead, or if he or she has not been heard of for seven years, and there is no reason to believe him or her to have been alive during this period. The order may be followed by a decree dissolving the marriage, but the petitioner must give full details of the steps which have been taken to trace the respondent, before the Court will condemn him or her to judicial extinction. If, moreover, the 'dead' person comes to life at any time before the decree is made absolute, the decree *nisi* will be rescinded upon the intervention of any party interested.

If either party has the misfortune to be married to a partner who is not quite sane, but not sufficiently insane to be classed as a lunatic, the position is very difficult. If the husband, in one of his moods of insanity, treats the wife with cruelty, she may nevertheless be refused a decree of divorce unless the Court considers that her husband fully appreciated the nature

of his acts. One essence of legal cruelty is an understanding by the respondent of the acts which are said to amount to cruelty. If the acts are committed in a fit of insanity, there is no remedy by way of divorce for cruelty. Should, however, the husband's condition require restraint, he may be certified by doctors, and removed to a mental home under certain conditions. Even this will not enable a spouse to obtain a divorce on the ground of insanity. No decree on this ground can be granted until the patient has been continually under care and treatment for a period of at least five years immediately preceding the presentation of the petition, and unless there is medical evidence that there is no prospect of recovery.

A husband is normally liable for his wife's costs in divorce cases, and he may always be required by the Court to provide security for her costs, whether the wife is the petitioner or the respondent. A guilty wife may be ordered to pay costs if she has separate property, and if there is a prayer in the husband's petition asking for an order for costs against her. A co-respondent will usually be ordered to pay the costs of the proceedings if the petitioner is able to satisfy the Court that the co-respondent knew the respondent was a married woman when the adultery was committed.

A petitioner is always entitled to ask for damages against a co-respondent. The claim is usually made by a husband who feels that the co-respondent has broken up a happy marriage or who regards his wife as a commercial proposition, whose worth should be assessed by the Court. If damages are awarded, they are based upon the pecuniary loss which the husband has suffered, and not upon the means of the co-respondent. Damages may, of course, be substantial if the co-respondent has really broken up a happy home, and may be trivial if the marriage had been reduced to a sham before the adultery was committed.

The custody of children, when there is a divorce, may give rise to the problems which have been considered in Chapter 23.

Divorce law presents many strange anomalies. They arise from the fact that divorce was previously a prerogative of the Ecclesiastical Courts. The Church has always regarded

marriage as sacred, and a divorce could only be granted by a Private Act of Parliament. Indeed, until the Matrimonial Causes Act 1857, no civil court had power to try actions for dissolution of marriage. In 1946, when John Doe's views on 'freedom' differ from those of his ancestors, he may revile a system which prevents him from breaking the chains of marriage as easily as he would wish. He often doubts whether a shadow marriage is a burden which a 'civilised' man ought to bear. Perhaps if public opinion continues to progress at its present speed, either forward or backward (according to your personal view), existing anomalies in divorce practice may disappear in the course of years. It would, however, be rash to prophesy. The subject of divorce law reform is tricky. It has been before Parliament on many occasions, and since Sir Alan Herbert was successful in 1937 in piloting a Bill through the House of Commons, which later became the Matrimonial Causes Act 1937, the divorce rate has soared. Penny-in-the-slot divorces might still fail to receive universal support, however, and M.P.'s, following what they presumably believe to be public opinion, always seem reluctant to sanction any change in the law designed to facilitate dissolution of marriage. Matrimony still appears to be regarded as an institution, and it is not necessarily reasonable for John Doe and his wife to describe divorce laws as 'cant' and 'hypocrisy', because they disagree with this view. The law *does* sometimes reflect the views of the majority, and John Doe and his wife, who live in a democracy, ought not to blame the law because they disagree with the majority.

A crumb of comfort may be offered to some of those afflicted by these 'iniquitous' laws and the 'cold clatter of morality'. There is increasing popular fancy for the escape method which is offered to a woman by changing her name. 'What's in a name?' In law, a natural British-born subject (but not an alien) is entitled to call himself by any surname which he may choose. He is not bound by his birth or baptismal certificate. If a woman wishes to change her surname, she may adopt the name of the partner with

whom she has elected to live, without the formality of a marriage ceremony. This change of surname—but not of Christian name—may be effected by different methods. The orthodox procedure is complicated and expensive, and a married woman requires the consent of her husband. It also involves advertisements, oaths, and other legal paraphernalia. The simpler method is to execute a deed, called a ‘deed poll’, recording the abandonment of the old name and the adoption of the new. This deed can be prepared expeditiously by any lawyer, and when it has been executed and stamped with a 10s. stamp, the change is effective for all practical purposes. It is, however, frequently convenient to obtain one or more photographic copies of the deed which may be lodged with solicitors and bankers, to be produced as evidence of the change of name in the event of the loss of the original.

A Christian name may not legally be changed at will, since it is given at baptism, and is a matter which primarily relates to the Church membership of the holder. It may, strictly speaking, only be changed at confirmation or by Private Act of Parliament, but the law is, perhaps, more conservative than the practice, as no offence is committed if a natural-born British subject chooses to adopt a Christian name other than that with which he was endowed at birth.

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WILLS, INTESTACY AND TRUSTS

'Can anyone do much for anyone else unless by making a Will in his favour and dying then and there?'

The Way of All Flesh

THERE is no branch of the law which better illustrates the pitfalls open to the ordinary man, than that relating to wills. Making a will or testament—the words now have a similar meaning—is a job for a lawyer. An attempt to follow the instructions given on a sixpenny will form, procured from a local stationer, frequently ends in the Law Courts. Home-made wills have provided a rich harvest for lawyers, and a small sum spent in obtaining professional advice in the preparation of a will may frequently avoid litigation at a later date.

It is proper that wills should be highly technical documents, for if the law were to admit informal directions for disposing of property after death, it would give rise to many cases of fraud. For example, your 'friend' John Doe might invite you to a drink at the Red Lion, and ask you to sign a document which he tells you is a petition for improving the local railway services. If John Doe were a swindler, and the document was not a petition at all, but a will by which you bequeathed your estate to him, it might lead to great injustice. This example may sound fantastic, but every lawyer will tell you of people who are defrauded, because they sign documents before they read them. Sometimes the swindler is caught, but not so easily when the defrauded man is dead.

To ensure as far as possible that a man appreciates the nature of his act, when he signs a will, the Wills Act 1837 requires every will (with the exception of wills of those on active service with the armed forces, and of merchant seamen at sea) to be in writing, and signed at the foot or end in the presence of two witnesses. The 'testator'—*i.e.*, the man making the will—together with both the witnesses, must all

sign the will in the presence of each other, and unless the will is signed with these formalities, it is void and of no effect. As a further safeguard against fraud, neither the witness of a will, nor the husband or wife of a witness, may take a legacy or any other benefit under a will.

It is scarcely necessary to emphasise the desirability of making a will, if you have any definite wishes for the disposal of your property after your death. It is not a matter which should be put off for a more suitable occasion, as death does not await the pleasure of a man who procrastinates. 'Die, my dear Doctor, is the last thing I shall do', are famous last words.

When a testator makes his will he should appoint one or more persons, not exceeding four in all, to 'wind up his estate'—*i.e.*, to deal with his affairs after his death. They are called his 'executors', and an executor who later proves the will is the 'personal representative' of the estate of the deceased. The function of executors is more particularly described in the next chapter. Their office is often a thankless one, and if the testator does not know of any friend or friends willing to act, he may appoint either his solicitor, his Bank, or the Public Trustee. Banks undertake the duties on terms obtainable from any of their branches. The Public Trustee, who administers a large number of estates throughout the country, is a Government official set up by the Public Trustee Act 1906, an Act which regulates the terms and conditions upon which he acts.

If a testator wishes the whole of his estate to be distributed as soon as possible after his death, the will may be a comparatively simple one. A lawyer can record the testator's wishes in language which is easy to understand. If, however, the testator prepares the will himself, he cannot be expected to realise that words which are used in a colloquial sense do not necessarily have an identical dictionary meaning, or may have received judicial interpretation. A simple will might read, 'I leave all my money to John Doe'. The word 'money' ordinarily means a token of exchange or cash. It does not include stocks and shares or other

property. Until 1943, when the House of Lords delivered a judgment extending the ordinary meaning of the word 'money', a bequest of 'all my money' in a will has almost invariably failed to give effect to the probable wishes of the testator, to dispose of *all* his property. The testator who has written 'I leave all my money to John Doe' may have meant to say 'I leave all of which I die possessed to John Doe'. It has in many cases proved unfortunate for John Doe that he did not say so. Moreover, even the decision of the House of Lords in the case referred to does not necessarily mean that the word 'money' will suffice in the future to cover all property in every will. The House of Lords reached its decision on the facts before it, but affirmed its freedom from being bound by any narrow construction, so that when you dispose of all your property by will it is still inadvisable to limit yourself to the use of the word 'money'.

When a testator uses a word or phrase which has a different meaning from that which he thinks, it is not the duty of the law to try to decide what he intended. If the law operated in this way, it would give rise to more injustice than it would cure, for who is entitled to explain after a man's death what his wishes were really intended to be, when the words he has used in his will do not legally express those wishes? The method which is applied by the Courts—and it is the only safe and just method—is to construe the will exactly according to the words which have been used. Whilst therefore the Court is anxious, when legally possible, to give effect to the intentions of the testator, it is not competent to add to or alter any of his words. It can only give consideration to every word and every phrase which throws light on its construction, but words and phrases may never be added. It is the will of the testator, and not the wishes of his relatives, which must be construed. The Court will refuse to tamper in any way with the chosen words.

The debts and funeral expenses of a testator must always be paid in priority to any legacies, so there is no special need to include a direction for their payment in the will.

The testator should specify the particular bequests—*i.e.*, legacies or money gifts, or gifts of specific chattels, which he desires to make, and he should give directions for the disposal of the remainder of his property, called the 'residue'. 'Residuary estate' comprises everything which is not otherwise specifically disposed of by the will.

When a testator makes a bequest, he should exercise great caution before he attaches any condition to the payment, for the beneficiary is entitled to take the bequest free of the condition, either if it is repugnant to public policy, or if it is too vague to be capable of any certain legal construction. Moreover, a testator should always be careful, when he makes a bequest, to be precise and exact in expressing his wishes. If you leave your estate 'to be divided equally between all persons living in Hemel Hempsted, Hertfordshire, who have red hair', the Court may say that your wishes are too uncertain to be fulfilled, since no two people may agree on the meaning of the expression 'red hair'.

If a bequest is void for uncertainty the proposed beneficiary will receive nothing. There is an exception in the case of bequests to charities. In such a case, and if your wishes are not clearly enough expressed to be determined with certainty, the Court has power to give direction for the money to be applied for purposes which appear, as nearly as possible, to carry out your wishes, on the principles of a legal doctrine called the 'Cy-près' doctrine (French 'near to that'.)

When we speak of a 'charity', we mean objects which are charitable in the legal sense, and there is no power to apply the cy-près doctrine, except to bequests which are definitely charitable. In a recent celebrated case a testator left his money to be applied for 'such charitable or benevolent purposes' as his executors thought fit, within certain limits. The estate was large, and the executors selected the objects which fell within the powers given to them by the will, and distributed the money. Some months later, the next of kin, who had not received any benefits under the will, decided to challenge the bequest on the ground that it was not charitable, and was

too uncertain to be enforced. After litigation which went to the House of Lords, the bequest was declared to be bad, since the words 'charitable *or* benevolent' were not necessarily 'charitable'. Many objects might be benevolent without being charitable, and had the words in the will been 'charitable *and* benevolent', all would have been well, for the greater must include the lesser. The result proved disastrous to the executors who had paid away the money, and were unable to meet their liability to the next of kin which resulted from the decision. This case contains a moral, even for lawyers, since it serves to prove that the law insists upon precision, and the more precise and clear our thoughts and actions, the less likely we shall be to fall foul of the law.

If the testator leaves a wife and children surviving, he will frequently desire to make financial provisions for the children, which are not to come into force until after the death of his wife. In that event the will must contain specific directions which will prevent the distribution of the estate during the life of his wife. If you execute a home-made will leaving everything to your wife, and after her death to your children, your wishes cannot be legally carried out. You have left your property twice over (1) to your wife, (2) to your children. The effect would be that your wife would be able to dispose of all your property during her lifetime, leaving nothing for the children. If you wish your children to benefit after the death of your wife, you must use words which are accepted by the law as having that effect. This is done by a procedure peculiar to English law called 'creating a trust'.

A trust is of great significance in English legal history, but unfortunately it is another of those tiresome, complicated stories, which cannot be compressed into anything simple, and I do not favour any attempt to achieve the impossible. It probably took its rise in the thirteenth century, when the Crown became jealous of certain religious bodies which were acquiring land, thus depriving the Crown of the profits extracted from private holdings. When the danger of confiscation loomed, these religious bodies arranged for their

lands to be acquired by the landowning class, who would hold them for their 'use', and the practice became known as 'putting land to uses'. The landowner was the legal owner, and the religious body was the beneficiary—*i.e.*, it was entitled to the beneficial occupation of the land. If we skip the intervening six centuries, we arrive at the present doctrine of 'trusts'.

Trusts may be expressly created by deed or other documents, or even by word of mouth. Sometimes, the law will assume a trust to have been created. For example, if John Doe purchases a property in the name of Richard Roe, the latter will normally be deemed to be a 'trustee' of the property for John Doe—*i.e.*, the law assumes that Richard Roe holds the property in trust for John Doe. On the other hand, if John Doe purchases property in the name of his wife Joan, the law will assume that the property is a gift from John Doe to his wife. Evidence may be given that these assumptions are not correct. In the former case Richard Roe may prove that the property does in fact belong to him, and in the latter case John Doe may prove that his wife really holds the property in trust for him. A trust always imposes legal obligations on the trustees, and a 'breach of trust'—*i.e.*, a failure to carry out the specified terms of the trust—is, accordingly, a breach of a legal duty. It will give rise to a right of action by beneficiaries—*i.e.*, the persons who are entitled to benefit under the trust—and they may claim damages equivalent to any actual loss sustained by the breach. The general duties of a trustee will be considered in the next chapter.

When a testator sets up a trust in his will he usually, but not necessarily, appoints his executors to act also as the trustees. If the trust is in favour of the widow and children of the testator, the widow will frequently have a 'life interest' in the estate—*i.e.*, directions will be given in the will for the income from the investments to be paid to the widow for her life, and realisation and division of the trust funds, after her death, among the testator's children.

One of the many rules which must be observed by a testator when he sets up a trust, and desires his wishes to be

legally effective, is the 'Rule against Perpetuities'. If you settle or leave a sum of £500 to trustees on trust to accumulate the money for a period of 500 years, and at the end of that time to pay it to your most direct descendant, the result would be fantastic. Of course, this is an extreme case, but money accumulated at compound interest at 5% will double itself in fourteen years, and at the end of even 300 years it would reach the astronomical figure of over one thousand million pounds. At the end of 500 years it would provide more than sufficient to pay off the National Debt!

To safeguard the community against absurdities of this character, the law has laid down that a man may not dispose of his property so as to 'tie it up' for a longer period than 'a life or lives in being and twenty-one years thereafter'. The lifetime of members of the Royal Family has been used as a yardstick in applying this rule, and there were cases in the last century when testators left their property to be distributed twenty-one years after the death of the last of a number of European reigning sovereigns. Such a disposition was within the law, but if the bounds permitted by the rule are exceeded, the trustees are not entitled to distribute the fund at the end of the permitted period, for the proposed trust is absolutely null and void.

A trust usually gives directions as to the class of securities in which the Capital funds, or trust monies, are to be invested, and unless such directions are given, all investments must be made in securities called 'trustee securities', which are designated by law as proper investments for trustees.

In making his will, the testator should have regard for his legal and moral obligations. Although he is not expressly bound to leave part of his estate to any member of his family, the Inheritance (Family Provisions) Act 1938 entitles the Court, when the testator has made no adequate provision in his will, to make an order for maintenance, within specified limits, in favour of a wife or husband, an infant child, an unmarried daughter, or a daughter or son who is incapable of maintaining himself or herself. A person entitled to make a claim under these provisions must apply to the Court within

six months after the issue of the 'grant of representation' to the estate of the deceased, dealt with in the next chapter. When an application is made under the Act, the Court will only make an order in favour of the applicant, if it thinks fit to do so, after it has taken into consideration all relevant factors, including any personal reasons the testator may have expressed for excluding the applicant from receiving any adequate benefit under his will.

In the absence of express provision in a will, or a trust, a trustee, other than the Public Trustee, is not entitled to any remuneration for his services, but he has a right to be reimbursed for expenses properly incurred by him in carrying out his duties. The Public Trustee has express power to charge fees, and Banks will only agree to accept the office of trustee if the document which appoints them includes a provision which allows them payment of their prescribed fees.

No alteration may be made in a will after it has been executed. If it contains erasures or alterations, they must all be signed both by the testator and the witnesses prior to its execution. If a testator wishes to make alterations after the will has been signed, he can only give effect to his revised desires by a new will, or by a document called a 'codicil'. This specifies the alterations he wishes to make, and a codicil must be executed with the same strict formalities as the will.

A will may always be revoked. Revocation is automatically effected by marriage, unless the will has been made, and is stated to be made, in contemplation of the marriage in question. Revocation may also be effected either by making a subsequent will which expressly revokes the earlier will, or by deliberate destruction. A will is not revoked unless the expression of the desire to revoke is accompanied by some positive act, which is evidence of that desire.

As a will does not take effect until after the death of the testator, the will is normally construed as though it had been executed on the day on which the testator died. This means that if John Doe has given Richard Roe a legacy of £100, and Richard Roe 'predeceases', or dies, before the testator, his

legacy 'lapses'. It is not payable to his wife or family. There is a peculiar exception to this rule, if the legacy is to a direct descendant of the testator. If the descendant has died during the lifetime of the testator, leaving issue (but not otherwise), the legacy does not lapse, but is paid to the personal representative of the deceased descendant.

When a will sets up a trust in favour of children they will have either a 'vested' or a 'contingent' interest in the estate, dependent on the exact phraseology which has been used. If the benefit to the children is not to lapse if they die before it becomes payable—*i.e.*, if the testator gives his widow a life interest, and after her death leaves the estate 'to my children living at the date of my death and if more than one in equal shares',—each child has a 'vested' interest in his share of the estate. This means that if a child dies during the lifetime of the widow, its share will be payable to its personal representative after the death of the widow. If, on the other hand, the actual words used give his widow a life interest 'and after her death to my children living at the date of my wife's death and if more than one, in equal shares', each child has a 'contingent', as distinct from a 'vested' interest, for the share or interest of each child is then contingent on its surviving the widow. From a practical point of view the difference is important. A beneficiary with a vested interest may sell or mortgage it, but he will not easily do so if it is contingent, unless he gives other security.

A man's property or estate falls into two classes, called real property and personal property. The former consists of freehold estates, described in Chapter 18, and the latter consists, generally speaking, of every other type of property, and all personal effects. Until the passing of the Law of Property Act 1925, there was a vital distinction between the two classes, for when a man died intestate—*i.e.*, without making a will—before that date, all his real estate passed to his heir at law, whilst his personal estate was divisible among his next of kin. His eldest son, if there was one, was the heir at law, but his wife and his children, if any, were the next of kin. However, since 1925 this distinction has virtually

ceased to exist, and in the absence of a will, all property, both real and personal, is now divisible among the next of kin, whilst the heir-at-law receives no special privilege.

Before the estate is divided between the next of kin on an intestacy, the widow or widower, if there is one, is entitled to receive the personal chattels and effects of the deceased, which include furniture, jewellery and clothing, and also a sum of £1,000 with interest at 5% from the date of death until payment.

The next of kin of anyone who has died after 1925 are defined by the provisions of the Administration of Estates Act 1925. They are, in order of precedence: (1) wife or husband of the deceased, (2) children, (3) father and mother, (4) brothers and sisters, (5) half brothers and sisters, (6) nephews and nieces, (7) grandparents, (8) uncles and aunts, and children or grandchildren of a deceased uncle or aunt. If the deceased has died intestate, without leaving a relative within any of these eight degrees, the whole of the property, after payment of the debts, will pass to the Crown—*i.e.*, the estate will fall into the communal chest. No relative who is not within the eight specified degrees is entitled to any share of the estate, and neither a woman living with a man to whom she is not married, nor an illegitimate child, has normally any legal right to a share of the estate. Moreover, the Inheritance Act has no application in any case when the deceased has not left a will. An illegitimate child is, however, entitled to participate in its mother's estate under the Legitimacy Act 1926, when its mother does not leave any legitimate issue.

The exact division of the estate among the next of kin is complicated, and may best be illustrated by examples.

Example 1. John Doe has died intestate leaving surviving him his widow, Joan, and three children, Anne, Bella and Christopher or A, B and C. After payment of John Doe's debts, Joan Doe will receive the sum of £1,000 free of death duties and expenses, and also the personal chattels. The remainder of the estate is then divided into two equal parts, which may be called, respectively, the children's share and the widow's share. They are dealt with as follows:—

(1) *The Children's Share.* This is divided equally between A, B and C, provided they each attain the age of twenty-one, and they will therefore each receive one sixth of John Doe's estate. If one of the children, A, had died during her father's lifetime, leaving two children, Margaret and Rachel, each of these children will take one-half of the one-sixth share, which A would have received if she had survived. If A had died without leaving children, or leaving children all of whom die under the age of twenty-one, her one-sixth share would lapse, and B and C would take the children's share equally between them, and would each receive one fourth of John Doe's estate.

(2) *The Widow's Share.* This is dealt with in quite a different manner. It must be invested in trustee securities, and the interest received from the securities is payable to Joan Doe during her life, and after her death the share becomes divisible among John Doe's children, in the same proportions as the children's share.

Example 2. John Doe has died leaving his widow, Joan, without children. He has, however, left other next of kin within the eight specified degrees. The widow will receive £1,000 and the personal chattels, as before, but she is then entitled to a life interest in the whole of the residuary estate, and this becomes divisible after her death among the next of kin, who were living at the date of John Doe's death. If any of the next of kin have died during the lifetime of the widow, leaving children, the children will between them be entitled to the share which their parent would have received, if he or she had survived.

Example 3. If John Doe died leaving his widow, and no other next of kin within the eight specified degrees, the widow will be entitled to the whole estate absolutely.

'Let's choose executors, and talk of wills', by all means, but are you now satisfied that although it is highly desirable for every man to make a will, it is not a job which anyone should endeavour to undertake personally.

EXECUTORS, ADMINISTRATORS AND TRUSTEES

'Now for vexation, and exasperation, and endless trouble.'

Jane Eyre

AFTER the death of a testator, it is the duty of an executor, if he is willing to act, to assume the control and management of the estate and to take steps for its administration. It used to be the practice for the family lawyer to read the will of the deceased after the funeral. There is no obligation to do so, and in the majority of cases it is no longer the practice.

Although an executor has power to act as soon as the testator has died, he should take steps to establish his title as soon as possible. No executor is compelled to act if he does not desire to do so. He may sign a document called a 'renunciation', which will relieve him of any obligation to accept the office. He must, however, make up his mind promptly. If he has once intermeddled in the affairs of the deceased, it may be too late for him to renounce, and if an executor has taken on himself the burden of office, he is not allowed to resign or relinquish his duties.

An executor proves a will—*i.e.*, establishes his title—by making an application to the Probate Registry for a grant of probate of the will. This application must be supported by an affidavit in which the executor undertakes to administer the estate in accordance with the law. He must also make an affidavit giving details of the estate, and schedules are attached setting out particulars of all the assets and liabilities. Details are given in Chapter 28 of the appropriate death duties payable to the Estate Duty Office. These formalities are usually carried out by a lawyer, but the executor may make a personal application for the grant. He will only usually do so, however, if the estate is small and he has plenty of time at

his disposal. Personal applications should be made to Ingersoll House, 1 Kingsway, London, W.C.2.

If the deceased has not made a will, or if he has not appointed an executor by his will, no one is empowered to deal with his estate after his death until a grant, called a Grant of Letters of Administration, has been obtained. This grant is also issued out of the Probate Registry. If the deceased has made a will, without appointing an executor willing or able to act, the application for administration with the will annexed is usually made by one or two of the residuary legatees—*i.e.*, the persons entitled to share in the residue of the estate—but no grant will be issued to anyone under the age of twenty-one. If there is an intestacy—*i.e.*, if there is no will—the application is usually made by two of the next of kin. In either event, the administrators must make affidavits similar to those required from an executor, but, in addition, administrators are obliged to find two sureties willing to guarantee that the administrators will fulfil their legal obligations. The guarantee is given by a 'Surety Bond', which requires the sureties to pay penalties if the administrators do not carry out their legal duties. An administrator may find it invidious to ask friends to stand surety for him. If, however, he decides to ask them to do so, it may be embarrassing to refuse the request. The alternative course for the administrators is to ask an Insurance Company to give the bond. A number of insurance companies specialise in this business. But it entails expense, which may be avoided when an executor has been appointed.

When application is made for Probate the grant may be withheld because a 'caveat' has been lodged. A caveat, or caution, is a notice filed by someone who wishes to oppose the grant on one or other of a number of grounds. These include the following: (1) An allegation that the testator was not of sound mind and understanding when he executed the will, or that he did not appreciate the nature and contents of the document. (2) A claim that the will which is presented for probate is not the last will of the testator. (3) A claim that the will was not duly executed.

(4) A claim that the will was procured by undue influence, which means that unfair, or improper, pressure was brought to bear on the testator in order to persuade him to make the will. All these may be grounds for rejecting a will which is offered for Probate.

When a caveat has been entered, and it is not 'subducted'—*i.e.*, withdrawn—Court proceedings must be taken to establish the validity of the will, and the Court must decide, after it has heard all the evidence, whether or not the will is a valid testamentary instrument.

The onus of upsetting any will is, generally speaking, placed upon the person who impeaches its validity. It is necessary to satisfy the Court by positive evidence, and not by mere hearsay or suspicion, that the testator did not understand or appreciate the nature of his acts, and that the disposition of his property did not represent his free and independent wishes. Unless these facts are proved, the will will usually be admitted to probate, subject to formal proof of due execution in accordance with the requirements described in the last chapter. It will be observed that there is nothing in these limitations which precludes a person of unsound mind from making a will, on condition that the will is made during a lucid interval—*i.e.*, when the testator understands and appreciates the nature of what he is doing.

As a general rule, the production and lodgment in the Probate Registry of the original will is essential, before Probate is issued. If, however, the original will has been lost, or accidentally destroyed, the Court may make an order, giving leave to prove a copy. In such circumstances the Court will require to be satisfied not only that the copy is a true copy, but also that the original will was duly executed and has not been revoked.

Both the Grant of Probate, and Letters of Administration, are known as a Grant of Representation, and the executor or the administrator is described as the 'personal representative' of the estate of the deceased. After a Grant of Representation has been obtained, the personal representative must take

steps to administer the estate, and his first duty is to pay the debts and funeral expenses.

When an estate is 'insolvent'—*i.e.*, when there are insufficient funds to pay all the debts, let alone the legacies—the unfortunate legatees get nothing, as debts must always be paid in priority to legacies. Special rules exist as to the distribution of an insolvent estate. These provide as to the priority in which payment of the debts is to be made, and also the circumstances in which an executor may 'prefer'—*i.e.*, pay one debt in priority to another, or in some cases 'retain' a debt due to himself. These rules are complicated, and any person named as an executor would be wise to renounce the office, if there is any likelihood of the estate being insolvent, unless he wishes to take on a waggon load of trouble. Proceedings to administer an estate in bankruptcy may be taken by a creditor in proper cases, but any payment made by the administrator prior to the commencement of such proceedings, will not, generally speaking, be invalidated by such a course.

In order to protect a personal representative against claims of creditors, after he has completed his administration of the estate, it is customary for him to insert a notice in the *London Gazette*, which is an official publication, and also in a newspaper circulating in the district in which the deceased had his residence, requiring creditors to notify their claims within a specified period—usually two months. If they do not do so, they may subsequently be barred, and there will be no liability on the personal representative.

After payment of the debts and funeral expenses (and the cost of a memorial stone may not be included as part of the funeral expenses, unless express provision has been made in the will for payment) the personal representative should proceed to deal with any bequests left by the will, and also to pay the legacies, after discharging the legacy duty, when necessary, in each case. When a specific article, such as 'my grandfather clock', is given to Richard Roe by a will made by John Doe, and the clock has been sold or given away between the date of the will and the date of John Doe's

death, so that it no longer forms part of John Doe's estate, Richard Roe gets nothing, and he is not entitled to compensation for his loss.

In cases in which there are sufficient assets to pay the debts, but insufficient to pay all the legacies in full, the specific legacies—*i.e.*, the bequest of specific chattels, must first be dealt with, and, thereafter, all the pecuniary legacies must be treated on an equal footing, and must 'abate' rateably. Legacy Duty is dealt with in Chapter 28, and one year from the date of the death is normally allowed for payment of legacies.

When the bequests and legacies have been discharged, the personal representative is left with the duty of disposing of the residuary estate. Final accounts must then be prepared. Chapter 28 gives particulars of further affidavits and accounts which are required, and the further duties which must in many cases be paid. When this business has been completed the estate may be finally distributed, and any land or houses comprised in the residuary estate will be 'vested' in the beneficiaries—*i.e.*, the title-deeds will be formally made over to them.

When a trust is created by a will, the duties of the trustee commence, and the duties of the personal representative end, when the funds are 'appropriated' or allocated to the purposes of the trust.

Although trusts are frequently created by will, they may, as stated in the previous chapter, be created in other ways, and the rights and obligations of a trustee are largely regulated by the Trustee Act 1925. If you are asked to act as a trustee it would be wise, before you agree to do so, to ascertain precisely what is involved. The duties should never be undertaken lightly, for many burdens are imposed upon every trustee. Here are some of them.

(1) A trustee must make himself familiar with the terms of the trust, since, in general, he is only entitled to act in accordance with the express powers which are given to him.

(2) A trustee is not entitled, as a general rule, to appoint an agent to act in his place. This rule is modified by allowing

him to employ qualified agents in proper cases, and also in certain other circumstances when he requires professional advice. For instance, he may employ a solicitor to undertake legal work, an estate agent to negotiate the sale of property, or a stockbroker to carry out the sale of investments.

(3) A trustee is not entitled to act without the concurrence of his co-trustees, if any, nor may he permit his co-trustees to act without his concurrence. If they do so, and a loss results, he may be held liable for a breach of trust, unless they have acted without his knowledge, and without any negligence on his part.

(4) A trustee must act with strict impartiality towards all the beneficiaries, and must not favour one at the expense of another.

(5) A trustee is not permitted either directly, or indirectly, to make any profit out of his office, unless the trust deed expressly allows him to receive remuneration. If he does so in other cases he may be called upon to pay over any profit he has made to the beneficiaries.

(6) A trustee is under a duty to exercise vigilance over the property of the trust. This means that he must always act with prudence, and if he has a turn for speculation, it is no excuse for him to say that he only dealt with the trust property in the same way as he would have dealt with his own affairs.

(7) A trustee may only invest the trust property in such investments as are authorised by the terms of the trust, or, if no particular securities are specified, he must limit his investments to those which are authorised by the Trustee Act 1925.

(8) If property is lost, or has depreciated in value, as a result of default on the part of the trustee, he may be compelled to make good the loss. The Court, however, has power in a proper case, in which a trustee has acted honestly and reasonably, and ought fairly to be excused for any loss, to relieve him from some or all of this personal liability.

(9) A trustee is always under an obligation to render a full account of his stewardship to his beneficiaries.

(10) A trustee is not entitled to purchase for himself any

of the trust property, even although he is prepared to pay a fair price. To permit a trustee to do so, would obviously facilitate fraud by a dishonest trustee.

(11) If a trustee once accepts the office—and of course he is not under an obligation to do so, unless he so desires—there are a number of cases in which he cannot retire from the trust without the consent of his co-trustees, although he may be removed by the Court if he acts improperly, or becomes bankrupt, or becomes unfit to act.

In general, a trustee has no power to resort to the capital funds of the trust, if the income is insufficient to carry out all the objects of the trust. He may, however, do so in any case in which the trust instrument gives him the power, and when there are infant beneficiaries, there are express powers given by the Trustee Act 1925 which permit him to make advances out of capital for their benefit, under certain defined conditions.

A trustee may often find himself perplexed as to how he should act in any given circumstances. He should then seek professional advice, and in proper cases he is entitled to apply to the Court for directions, which may be given at the expense of the trust. He is not entitled to do so, however, if reasonable prudence clearly indicates the course which he should adopt.

The number of individual trustees has diminished in recent years. The Public Trustee, acting under the regulations of the Public Trustee Act 1906, and Trust Corporations, including the larger Banks, have all served to relieve individuals from personal responsibility. The nomination of one of these corporate bodies to act as trustee in place of individuals is frequently a wise policy, since it eliminates the difficulty which may always arise on the death of an individual trustee. The rules under which the Public Trustee acts may be obtained from the Public Trustee Office in Kingsway, London, whilst the conditions under which a Bank will accept nomination are contained in booklets published by each of the Banks.

Trusts are part of a branch of the English law known as

equity, and the administration of trusts falls within what is known as the 'equitable' jurisdiction of the Courts. This was formerly of great importance, but the note on 'Equity' in Appendix 1 explains the circumstances in which equity has now lost most of its distinctive features.

TAXES AND DEATH DUTIES

'Fancy giving money to the Government.'

Sir Alan Herbert, M.P.

THE most profitable of all taxes, from the point of view of the State, is income tax, which is regulated each year by a Finance Act, founded upon 'the Budget'. The finance acts deal with taxation from the 6th April in each year to the 5th April in the following year, so that the Finance Act 1946 relates to the period from 6th April 1946 to 5th April 1947. It is colloquially called the year 1946/47.

'Pay as You Earn', introduced by the Finance Act 1943, is not a substitution for income tax, but is a system designed to facilitate collection of the tax. You have probably had some experience of P.A.Y.E.; it involves deduction each week from the pay packet of a calculated sum for tax. Here is an explanation of how it works.

In the first week of each financial year, which commences on April 5th, the amount of tax with which you will be charged, and which will be deducted from your pay for that week, will be $\frac{1}{52}$ nd part of your total liability for tax for the year, on the assumption that your pay will be at the same weekly rate throughout the year. If your pay in the second week is, in fact, the same as in the first week, the deduction of tax will be approximately the same. If your pay in the second week is increased, or reduced, a fresh calculation of your liability must be made. In that case the pay for the first two weeks will be added together, and the total will be multiplied by 26, since $2 \times 26 = 52$. This will result in a sum, assumed to be the amount you will earn in the full year of fifty-two weeks. Your liability for tax will be calculated on this sum, and your liability for the first two weeks will be $\frac{1}{26}$ th of this amount. Credit will be given to you against this liability for the amount of tax already deducted in the first week, and the balance will be deducted from the second week. After the first week of the year, a week is never taken as a

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separate unit, for the tax calculations are based on the proportion which the number of weeks to date bears to the full year of fifty-two weeks. For example, after four weeks, the proportion is $\frac{4}{52}$ nds or $\frac{1}{13}$ th. If you have earned £20 in the first four weeks, your assumed earnings for the full year will be £260—i.e., £20 \times 13. If your liability for tax on £260 is £26, the amount of your liability for four weeks will be £2—i.e., $\frac{1}{13}$ th of this sum. If the total amount deducted for tax in the previous three weeks has been 35s., the balance of 5s. will be deducted from the fourth week. If the amount previously deducted has been 25s., the amount to be deducted in the fourth week will be 15s. If you have earned nothing in the fourth week, as a result of falling out of employment, it will result in a fall in your assumed income for the year. If the drop is from £260 to, say, £200, your liability for tax might be £18 instead of £26. Your liability to date would then be only $\frac{1}{13}$ th of £18 or say £1 8s. If, in such a case, you had paid £1 15s. in the first three weeks, there would be a refund due to you of 7s. in the fourth week.

The basic or standard rate of tax from April 1941 to April 1946 was 10s. on every pound of income. From April 1946 it is 9s. in the £. Before arriving at this basic rate, however, you are allowed a preliminary sum upon which no tax at all is charged. This is called a *personal allowance*. This sum does not bear any relation to the cost of living: it is an arbitrary figure. If you are single, it is, for the financial year 1946/47, £110. If you are a married man, it is £180. You are next allowed to deduct from your income a sum of £50 in respect of each child under sixteen, and also for a child over sixteen, if the child is receiving full-time instruction at a university, school, college or training establishment. In both cases the allowance is given only when the child has no income in its own right of over £50 a year. This is known as *Child Relief*.

This allowance has nothing to do with the allowance of 5s. a week paid by the Government since August 1946 in respect of every child, after the first, who is under 16.

You are next allowed a further deduction of $\frac{1}{8}$ th of your earned income, with a maximum allowance of £150. This allowance is known as *Earned Income Relief*. A similar $\frac{1}{8}$ th deduction up to a maximum of £150 is allowed on any earned income of your wife, if you are a married man, and in such a case there is an additional special allowance of $\frac{9}{10}$ ths of your wife's earned income, if any, with a maximum allowance of £110. Earned income of your wife in excess of £110 per annum, will be liable to tax, less the above-mentioned $\frac{1}{8}$ th deduction up to a maximum of £150. If your wife's earned income amounted to £500, £62 10s. plus £110 of such income would, accordingly, be exempt from tax. This $\frac{1}{8}$ th earned income allowance is also permitted on 'unearned' income, when the taxpayer is over sixty-five years of age, and his total income from all sources does not exceed £500 per annum.

Normally, a husband is liable for tax on the whole of his wife's income, but where a wife is not living with her husband, the wife may be separately assessed and charged as if she were unmarried. When husband and wife are divorced, or living apart under a deed of separation, and each is separately assessed, the husband cannot claim the marriage allowance of £180: he will be regarded as a single man, and he will receive only a single man's personal allowance of £110. The separated or divorced wife will also be entitled to a separate personal allowance of £110, as if she were an unmarried woman. The Government allows a bonus of £40 for immorality, since if a man and woman live together 'in sin', each is entitled to a personal allowance of £110, but if they later decide to become honest and marry, their joint personal allowance is reduced to £180.

In addition to the above allowances, the taxpayer is entitled to a further deduction of £50 for any dependent relative, when his or her income does not exceed £30 per annum, and he or she is

- (a) incapacitated by old age or infirmity; or

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(b) the taxpayer's widowed mother, or mother-in-law, whether incapacitated or not.

When the income of a dependent relative exceeds £30 per annum, then an allowance may be claimed of the difference between the dependent relative's income and £80 per annum. For example, if the dependent relative's income is £60, then the taxpayer may claim an allowance of tax on £20. If two or more persons help to maintain the relative, the allowance is divided between them.

A widower, or widow, may also claim an allowance of £50, if he or she employs a female relative, or some other female, for the purpose of acting as his or her housekeeper, or for the purpose of looking after his or her children. An unmarried person may claim a similar allowance, if he or she employs a housekeeper for the purpose of looking after any younger brother, or sister, for whom child relief may be claimed.

If a taxpayer is himself incapacitated by old age or infirmity, he may claim an allowance of £25 in respect of any daughter maintained by him for the purpose of looking after him, and a female taxpayer may make a similar claim.

Moreover, total exemption from tax liability is granted if the income from all sources does not exceed £120 in the case of a single man or woman, £200 in the case of a childless married couple, and £250 in the case of a couple with one child, with corresponding increases when there is more than one child.

When all the permitted allowances have been calculated, they are deducted from the gross income. There is also deducted from the gross income the amount of such interest, if any, as may be payable by the taxpayer on any fixed charge or mortgage, or any annual sum payable by him under any settlement, so far as such annual sum is allowed by the Revenue as a charge on his income. The net balance then remaining is called the *taxable income*. The whole of the taxable income is not, however, charged at the full standard rate of 9s. in the £. Apart from a reduced rate of tax payable on income which is

applied in payment of certain life insurance premiums, the rate of tax on the first £50 of taxable income is 3s. in the £. Tax at the rate of 6s. in the £ is payable on the next £75 of taxable income, and the remainder of the taxable income is then charged at the standard rate of 9s. in the £.

An example may help to explain this very intricate subject of allowances.

John Doe, married, with two children under sixteen, and one child of seventeen, receiving full-time instruction at a training college, has a gross income of £700, of which £600 is earned income and £100 (including the Government allowance of 5s. a week in respect of the youngest child, which must be included) is unearned income. His wife, Joan Doe, also works part time, for which she is paid £100 a year, so that their aggregate income is £800. John Doe keeps a widowed mother who has no income of her own, and he also has a mortgage of £500 on his house, on which he pays 5% interest—i.e., £25 a year.

His income tax liability is £72 15s. calculated as follows :—

<i>Gross Income.</i>	
<i>Earned:</i> Self	£600
Wife	100
	<hr/> 700
<i>Unearned Income</i>	100
	<hr/> 800
<i>Less Charges on income</i>	25
	<hr/> £775
<i>Deduct Reliefs.</i>	
Earned income relief (1/8th of £600—self)	£75
Wife's earned income (being under £110—exempt)	100
Personal allowances	180
Three children	150
Dependent relative	50
	<hr/> 555
<i>Taxable income</i>	<hr/> £220

<i>Tax liability :</i>	£ s.
£50 at 3s.	7 10
£75 at 6s.	22 10
£95 at 9s.	42 15
	<hr/>
	£72 15s.

When John Doe pays his mortgage interest, he is entitled to deduct tax at the full standard rate from the payment, so that instead of paying the mortgagee £25, he has, in fact, paid him only £13 15s.—namely, £25 less tax at 9s. in the £.

Now, it will be seen that in calculating the liability of £72 15s., John Doe has been given credit for £25 in respect of his mortgage interest, so that if he were allowed to retain the £11 5s. he has deducted, he would, in effect, be getting the relief twice over. Therefore, John Doe has to pay over to the Revenue the tax he has so deducted—namely, £11 5s.—and this will be added to his liability of £72 15s. If this £11 5s. were not added in this way, John Doe would be paying the Revenue only £61 10s.—namely, £72 15s., calculated as above, less the £11 5s. he has collected by deduction from the Mortgage interest.

John Doe having deducted tax from his mortgage interest, the mortgagee is entitled to ask him for a certificate of deduction of tax, usually given on the official tax form Number R185. This can be obtained from any Inspector of Taxes. The mortgagee will include this mortgage interest in his statement of taxed income, for the purpose of obtaining any rebate to which he may be entitled, and he will produce the certificate R185 that has been given to him by John Doe.

How are all these calculations worked into the P.A.Y.E. scheme? The method is not so complicated as might appear. You will recollect that before any tax is deducted from your pay, it is necessary to calculate your assumed total liability for tax for the full year. It is the duty of the Inspector of Taxes, who has to make the assessments, to calculate the total allowances due to each individual taxpayer. If the wage-earner has other sources of income, he may

already have received credit against that income for some of his tax allowances. Subject thereto, the aggregate allowance to which every individual is entitled is given a Code number, and the Code numbers range from 1 to 100. To enable employers to ascertain the amount of tax which they must deduct from each employee's wages, mathematical tables for each week or other fixed period are prepared, which show the total amount of tax payable to date in respect of each code number, according to the aggregate wages which have been paid from the beginning of the year to that date. For example, if your total earnings from April 5th, 1946, to November 1st, 1946, had amounted to £300, and your code number was 25, the tables for the week ending November 9th, 1946, showed your total liability for tax from April 5th, 1946, to November 1st, 1946, to be £53 13s. The tax which would have been deducted from your pay in that particular week would have been the difference between £53 13s. and the total amount which you had already paid since April 5th, 1946.

When the taxpayer has obtained some portion of his reliefs indirectly, such as by deduction of tax from a charge on his income, as shown in the case of John Doe's mortgage interest, then the gross amount of the charge is deducted from his allowances in arriving at his Code number.

Also, if the taxpayer has unearned investment income, such as War Stock, which has been paid to him gross—*i.e.*, before deduction of tax—it is often the practice of the Revenue to debit the gross amount of such interest for the year against his allowances, instead of applying to him for the tax direct.

On the other hand, if the taxpayer has unearned investment income which has suffered deduction of tax at the source, and his earned income does not exhaust all his allowances, the additional relief to which he is entitled will be credited to his Coding; also, any relief to which he may be entitled in respect of life assurance will be credited in arriving at his Coding number.

If the gross income of the taxpayer—*i.e.*, without making any deduction for sums upon which no tax or reduced tax

is payable—exceeds £2,000 a year, additional tax over and above the standard rate of 9s. in the £ is payable. It is called *sur-tax*. For the year 1945/46 sur-tax was charged at varying rates commencing with 2s. in the £ on the first £500 of income exceeding £2,000 and rising by degrees to 10s. 6d. in the £ on any income exceeding £20,000. Sur-tax rates on incomes exceeding £2,500 per annum are slightly increased for the year 1946/47. The effect of sur-tax is that people with gross incomes of over £20,000 are liable to pay as much as 19s. 6d. in the £ for tax on income in excess of that amount.

Income tax is levied under a number of different headings or Schedules, known as Schedules A, B, C, D and E.

Schedule A is the tax levied on the annual value of property—namely, lands and property such as houses—of which the taxpayer is the owner. This has been dealt with in greater detail in Chapter 16.

Schedule B is a tax levied on the occupation of land for purposes of husbandry, and as a general rule is applicable only to farmers, but land attached to private dwelling-houses in excess of 1 acre may be liable to tax under this schedule.

Schedule C. This schedule deals with tax on dividends, interest, annuities, etc., payable in the United Kingdom, out of public funds or out of the public funds of any other country. Income tax is deducted at the source in respect of income which arises under this schedule—i.e., the taxpayer only receives the net amount after deduction of tax.

Schedule D is tax collected on income from trades and professions, and also Bank and Post Office interest, and interest on certain Government securities, such as War Loan, from which tax is not deducted at the source. It also includes tax on income derived from foreign securities and possessions, and all other income not assessed under any other Schedule. Every trader must submit annual accounts to the Revenue, in order that his tax liability may be assessed under schedule D. If he fails to render accounts he may be assessed at such figure as appears reasonable to the Income-Tax authorities. He has a right of appeal from

an arbitrary assessment, but if he appeals, he must show that the figures upon which he has been assessed are incorrect, and he can, normally, only do this if he has accounts to submit which will prove the correct figures.

Schedule E. This is tax levied on income from employment, pensions, etc. All tax payable under this Schedule comes within the scope of P.A.Y.E., and is now deducted at source.

There is a right of appeal from every assessment for income tax. The appeal is heard before a tribunal presided over by experts appointed by the Government. They are called Commissioners of Inland Revenue. If aggrieved at their decision, the taxpayer may appeal to the High Court on any question of law. The decision of the Commissioners is, however, final on questions of fact.

If you receive all your income from dividends on stocks and shares of companies, income tax will, as you have seen, be deducted before payment. In such a case, you will not have received the allowances to which you are entitled. You may, however, make a claim to the Inspector of Taxes for an appropriate refund of the overpaid tax. A similar application may be made if you have received only part of your allowance. The necessary form to enable you to apply for the refund may be obtained from your local Inspector of Taxes. He will also give you assistance in completing it.

Prior to 1941-42 the personal allowance to which a married man was entitled was £170, and a single person £100. Also, the earned income relief was computed on the basis of 1/6th of total earned income, with a maximum of £250. Commencing with the year 1941-42, these allowances were reduced. When the cuts were made, however, the Government promised that the loss sustained would be repaid to each taxpayer after the War, and to implement this promise, Post-War Credit Certificates were issued for each of the years 1941/2 to 1945/6 inclusive, showing the amount payable to each taxpayer, as soon as the Government considered it expedient to do so. As a start to the fulfilment of this promise, the Finance Act 1946 provides for the redemption of Post-War Credit Certificates for each of the

years 1941/2, 1942/3 and 1943/4 in the case of men over sixty-five, and women over sixty years of age.

The most prolific source of Revenue after income tax and sur-tax is that which flows from estate, *i.e.*, death, duties. Prior to April 1946 these duties were levied on the estate of everyone who died leaving property of a value in excess of a gross sum of £100. By the Finance Act 1946, every person who has died on or after April 10th 1946 is entitled to total exemption if his estate does not exceed £2,000. The rate of duty is 1% on the net value of an estate over £2,000 and less than £3,000, 2% on an estate of £3,000 to £5,000, 3% on an estate of £5,000 to £7,500 and 4% on an estate of £7,500 to £10,000. Thereafter the scale rises more steeply and reaches 75% in the case of an estate in excess of £2,000,000. The duty is payable on the value, as at the date of death, of all property, both real and personal left by the deceased, and also on settled property, whilst interest at the rate of 2% is charged on the amount of the duty, from the date of death until the date of payment. Estate duty on personalty must be paid before a Grant of Representation can be obtained, and as it is not permissible to deal with the assets of a deceased person before the issue of the Grant, it is often expedient to arrange for an advance from Bankers of the necessary sums. Duty payable on real property, *i.e.*, land, need not, however, be paid immediately, but may be deferred and paid by instalments over a period of eight years, or in some cases real property may now be surrendered to the Government on account of death duties due on the whole estate.

Some of the formalities required in order to obtain a Grant of Representation to the estate of a deceased person were described in Chapter 27. For Estate Duty purposes, a list of the assets, together with their respective values, calculated as at the date of death, are scheduled to an affidavit, called the Inland Revenue Affidavit. This affidavit also contains details of the debts and funeral expenses of the deceased, and after it has been sworn by the person making the application for the grant, it is submitted to the Inland Revenue. The

Revenue then calculate the amount of the Estate Duty payable on the net value of the estate—*i.e.*, after deduction of the debts and funeral expenses.

Legacy and Succession Duty is payable in addition to Estate Duty in respect of all estates of a value in excess of £2,000. Legacy Duty is a duty payable on every legacy left by a will. It is not normally a charge against the estate of the deceased, but is payable by the person who receives the legacy. A testator, however, frequently gives directions in his will for his legacies to be paid 'Free of duty', and in that event the duty is normally payable out of his residuary estate.

Husband, wife, child, parent and grandparent of the deceased are all exempt from payment of legacy duty, if the estate does not exceed a net sum of £15,000. There is a further exemption from liability in the case of a legacy of less than £1,000, to a child of the deceased of over twenty-one, or of less than £2,000 to his widow or children under twenty-one. In other instances the rate of duty chargeable to relatives within these degrees is 1%. Legacy duty at the rate of 5% is payable in respect of legacies to brothers and sisters or their children, and at the rate of 10% in respect of legacies to more remote relatives, or to any beneficiary who is not related to the deceased. The personal representative is responsible to the Revenue for discharging the duty, and he may be personally liable for any loss which it suffers if he fails to comply with his obligations.

After the legacies have been paid, the personal representative may be in a position to wind up the estate. It frequently happens, however, in the course of the administration that additional assets come to light, or other assets are found to have been over or under valued. In all these cases another affidavit, called a 'corrective affidavit', must be filed giving details of the items which require correction. The additional duty must then be paid, or overpaid duty reclaimed, as the case may be. When this has been done the personal representative will usually file an account called a 'Residuary Account', showing the assets which

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remain to be distributed, and Succession Duty will be levied on this net residue at the same rates, and subject to the same exemptions, as in the case of legacy duty.

If the deceased has made any gift for public or charitable purposes within two years before the date of his death, estate duty is chargeable on the value of the gift. Other gifts, if any, which have been made at any time during the last five years of his life are also subject to payment of estate duty, unless they do not exceed an aggregate sum of £100. Such gifts will not, however, be liable for estate duty, if they were part of the reasonable normal expenditure of the deceased. For example, if the deceased had been in the habit of making one of his children a voluntary allowance of £150 a year, none of the five annual instalments paid by him during the last five years of his life would attract estate duty. Gifts made in consideration of marriage are also exempt.

If the deceased has made a settlement of property during his life, and has retained any interest in the settled property which ceases on his death, or from the termination of which a benefit accrues to some other person, duty will be payable on the value of the settled fund on his death, as it is classed as property which passes on death.

The rate of duty which is payable on any estate is assessed on the 'aggregate' value of all the property which 'passes on the death'. For example, if John Doe dies leaving an estate which consists of a freehold house valued at £3,000 and personal estate valued at £6,500, the gross value of the estate will be £9,500. If the debts and funeral expenses are £800, the net personalty will be £5,700 and the value of the estate for duty purposes will be £8,700. If, however, John Doe had made a gift of £1,000 to one of his children two years before he died, and had also settled a sum of £5,000 on another child several years previously, providing for the settled fund to pass to the child for its own use and benefit absolutely on John Doe's death, both of these amounts must be 'aggregated', or taken into account, before the appropriate rate of duty is assessed. In that event, the aggregate value of the estate for duty purposes will not be £8,700,

but will be £8,700 plus £1,000 plus £5,000 (or the market value of the settled property at the date of John Doe's death)—viz., £14,700 in all. Estate Duty on an estate of £8,700 is at the rate of 4%, but Estate Duty on an estate of £14,700 is 8%. Estate Duty at the rate of 8% will therefore be immediately payable on £5,700, being the value of the net personalty. Payment on the sum of £5,000, being the value of the realty, may, as stated, be deferred, whilst the estate will not be liable for the duty payable on the gift of £1,000, or on the duty payable on the settled property. In the former case the duty is payable by the beneficiary of the gift, and in the latter case the duty is payable out of the settled fund.

You may at times feel doubtful whether or not you obtain value for money in respect of the immense sums which are required to 'run the country'. However, we can scarcely feel more oppressed by taxation than some of our forefathers. This is what Sidney Smith, who died a hundred years ago, had to say on the subject of American taxation at that time, 'The schoolboy whips his taxed top—the beardless youth manages his taxed horse, with a taxed bridle on a taxed road; and the dying Englishman, pouring his medicine, which has paid 7%, into a spoon which has paid 15%—flings himself back upon his chintz bed, which has paid 22%—and expires in the arms of an apothecary who has paid a licence of £100 for the privilege of putting him to death.'

Table of Some of the More Usual Stamp Duties and Taxes.

Agreement under hand, not chargeable under any other heading	6d.
Agreement under Seal. See Deed.	
Bill of Exchange payable on demand or within three days after date or sight—any amount	2d.
Bills of Exchange, other than above, and other than Foreign Bills of Exchange	1s. per £100
Bills of Exchange—Foreign	6d. per £100
Companies—Capital share duty	10s. per £100
do. —Loan Capital	2s. 6d. per £100
Cheques	2d.

Contract note for the sale or purchase of Stocks and Shares. Transactions under £100	6d.
do. in excess of £100 on a rising scale up to £1 in respect of a transaction of £20,000.	
Conveyance on Sale of Property	£1 per £100
(A specially reduced rate of 10s. per cent. is payable when the transaction does not exceed £500, and is so certified in the document.)	
Deed of any kind, not chargeable under any other heading	10s.
Estate Duty. See Text of this chapter.	
Income Tax.	
Lease—not exceeding 35 years	£1 per £100 of rent.
Lease (Counterpart)	5s.
Legacy Duty. See Text of this chapter.	
Marriage Licence. See Chapter 24.	
Mortgages	2s. 6d. per £100
Power of Attorney	10s.
Promissory Note	1s. per £100
Receipts £2 or upwards	2d.
Settlement (other than a voluntary Conveyance)	5s. per £100
Transfer of Stocks and Shares and other Securities	£1 per £100

Note.—Agreements under hand must, generally speaking, be stamped within fourteen days of signature, and Deeds within thirty days of execution, or they are subject to a penalty.

CRIMINAL PROCEDURE AND THE FUNCTION OF THE JURY

The Inquisitor (blandly): "Master de Courcelles, the Maid alleges that she paid handsomely for the Bishop's horse, and that if he did not get the money, the fault was not hers. As that may be true, the point is one on which the Maid may well be acquitted."

Courcelles: "Yes, if it were an ordinary horse, but the Bishop's horse! How can she be acquitted for that?" (He sits down again, bewildered and discouraged.)

Bernard Shaw, *St. Joan*

A CRIME is an offence against the community. The Criminal Law and the Civil Law are two separate branches of our judicial system, and both consist of a mixture of Common Law and Statute Law, which frequently overlap. When a crime is committed, it is the prerogative of the Criminal Law to punish the offender, in order to protect the community, and not to provide a remedy for the injured party. Murder, arson, forgery, theft, and the rest of the criminal catalogue are not specifically dealt with in this book, and, although crime marches on, it is to be hoped that John Citizen will be satisfied to view these injuries to the community from a safe seat in the jury box. Some Sunday newspapers will always provide lurid colour in their reports of the more salacious type of crime, if this is what you desire.

This chapter is limited to the background of criminal procedure. It may not only help you to understand the legal steps which lead a defendant to the dock, but may also assist you to understand your function, if you are summoned to sit on a jury in a criminal case.

The scales of justice are often said to be unfairly weighted against a defendant in a criminal case. It is alleged that all the resources of the State are employed against him, in order to secure a conviction. This does not, in fact, present a true picture of criminal administration. The legal machine

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may not have a soul, but when you deal with crime, sentiment is easily misplaced. You are dealing with offences committed by a member of the community who would in many cases scorn pity, and would not thank you for expressing in public your private view that he is a 'poor devil'. This, however, does not mean that justice is not tempered with mercy.

In theory, the State or 'Rex'—*i.e.*, the King—is the prosecuting authority in every criminal case. 'Rex *versus* Doe' or 'Rex *versus* Roe' will be the name of the case when John Doe or Richard Roe is charged with a criminal offence. Legally, any member of the community may set the Criminal Law in motion for certain offences. In these cases he will have the assistance of the State machine in marshalling the evidence, but he must be prepared to sign the charge sheet and give evidence in Court. If he wishes, he may instruct his own solicitors and counsel to conduct the prosecution. A private prosecution always involves a certain amount of danger, however, for if it fails there is a risk of a civil action being brought by the accused man for damages for malicious prosecution, a class of action referred to in Chapter 15. The State will itself usually institute a prosecution when the mischief directly affects the Government, or the welfare of the community. For example, if the police catch a burglar, they will usually prosecute him. If, however, an employer has a dishonest employee who has been guilty of embezzlement—*i.e.*, the appropriation of money which belongs to the employer—the latter is usually expected to institute a private prosecution, if he wishes criminal action taken.

It is not easy to define with exactness the nature of the mischief which will prompt the police to take action. As a rough guide, it may be said that they will do so, as a matter of public policy, if the offence is one of violence, but not in respect of financial issues, except when the amounts involved are substantial. In cases of murder and other serious crimes, the conduct of the prosecution is frequently in the hands of a Government official called the Director of Public Prosecutions. The conduct of prosecu-

tions of lesser importance may remain in the hands of the police, under the instructions of their own solicitor.

When the Criminal Law is once set in motion, it is not, as a rule, permissible to withdraw a charge. Indeed, it is not even lawful to hold out a promise not to institute proceedings if restitution is made of stolen property, and for this reason it is an offence to offer a reward for its return stating that 'No questions will be asked'. This contrasts with proceedings in a Civil Court, which may always be abandoned or compromised on terms.

There are a large number of safeguards designed to secure fair treatment of a man accused of a crime. They will facilitate his acquittal, unless the facts proved against him, by evidence, establish his guilt beyond all reasonable doubt.

It would, of course, be ridiculous to suggest that innocent men are never convicted of a crime. No legal system operated by man could secure such a result, and we must be alive to the fact that either you or I may at any time be caught in the machinery of the law, and convicted of an offence which we have never committed. Such a contingency does not justify condemnation of a system which is necessarily subject to human judgment, and if this complacent view exasperates a victim who has been found guilty of a 'crime which he has never committed', it is an incontrovertible fact. Nobody blames the law when lightning strikes and causes irreparable injury to an innocent man. An act of God is accepted as inevitable. We do not always appreciate that an act of man may be equally inevitable, when it is a sequel to fallible human intelligence. In addition to inevitable human limitations, there is also the danger which arises when a judicial official regards the evidence of every police constable as 'testimony from heaven'.

Under the English legal system every man is deemed to be innocent until he is proved to be guilty. Other nations have other systems, but the majority of English people would undoubtedly prefer ten guilty men to be acquitted as a result of this assumption, than allow one innocent man to be condemned by the 'wild justice of revenge'. The effect of

the system is to deprive the police of power to subject any person to what are known as 'third degree' methods, when they intend to charge him with the commission of a crime. If a defendant wants to 'talk', he is permitted to do so, but nothing in the way of a confession may, generally speaking, be used in any proceedings subsequently brought against him, unless it can first be proved that he was warned, in clear terms, and before making the confession, that it might subsequently be used in evidence against him.

Lawyers rate highly our constitutional right of liberty, and it is the rule, rather than the exception, for a prisoner—*i.e.*, a man deprived of his liberty—to be released on bail until his trial takes place. He will usually only be refused bail for good reason. A man on trial on a charge of murder is always remanded in custody, for he would have no incentive to surrender himself to his bail to undergo a trial which might deprive him of any further interest in life. Bail may also be refused in any case when there are reasonable grounds to suspect that the prisoner will not attend to stand his trial. This danger may always exist if the prisoner has no fixed address, for in such a case it may not be difficult for him to find shelter with associates in the underworld. Bail may also be refused if the police suspect that the prisoner will tamper with the witnesses and induce them through fear, or otherwise, to withhold the truth.

Bail may also be refused in a grave charge, such as rape, or some big financial case, where a very large sum is involved unless someone stands 'surety' in a substantial sum. 'Surety' is a security which is given, by recognizance or bond, by a third party, to secure the defendant's attendance at the trial, when he is granted bail. If John Doe is remanded on bail, conditional on his finding a surety for £50, it means he must find a friend who is worth that sum, and is willing to stand bail for him. If John Doe does not subsequently attend to stand his trial, the bail may be 'estreated'—*i.e.*, the surety may be ordered to forfeit the sum of £50. In cases of stealing, or receiving stolen goods, which have not been recovered, bail is usually only granted on a

'surety' for a sum up to or nearly equal to the value of the missing property.

It is not necessarily the mark of a good citizen to deplore the occasions when a prisoner is remanded in custody, before he has been proved guilty of the offence with which he has been charged. The conception may outrage your feelings, but to let a man at liberty with little assurance of his attending to stand his trial, is to permit sentiment to dominate intelligence. The refusal of bail does not in any way affect the subsequent trial, and if a prisoner is aggrieved by the refusal to grant bail, he has a right of appeal to a High Court Judge. When an application of this kind is made, it is considered of such importance that it usually takes precedence over all other business before the Court on that day.

In every criminal case, the prosecution must prove by evidence that the defendant is guilty of the offence with which he is charged. Unless the evidence brought before the Court satisfies the jury that the charge has been proved beyond all reasonable doubt, the defendant is entitled to be acquitted. For this reason there is nothing unethical in a barrister undertaking the defence of a defendant, even although the latter has privately confessed his guilt. The English Criminal Law only recognises the guilt of a defendant when the offence has been proved by evidence, given in accordance with strict rules of procedure. A defendant is always formally asked whether he wishes to plead 'guilty' or 'not guilty' to the charge made against him and, unless the defendant elects to put forward a plea of 'guilty' in open Court, nothing may be assumed against him. Every fact must be strictly proved. In a murder case, the Court is always reluctant to accept a plea of 'guilty', and will exert its influence to induce the prisoner to plead 'not guilty', in order that the jury may hear the witnesses, and be satisfied that their evidence justifies the Court in pronouncing the death sentence.

When criminal proceedings are initiated, the defendant is usually charged on a warrant or a summons. The former authorises the arrest of the defendant. In all cases of felony (defined below) the police have power of arrest without

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a warrant, and in every case a man who is arrested must be formally brought before a magistrate within twenty-four hours of his arrest. A summons is issued in less serious cases, and a defendant, served with a summons, is required to attend the Court to answer a specified charge on a specified date. If he fails to appear, a warrant may then be issued for his arrest.

Before a defendant is brought before a jury, the prosecution must call evidence to prove a *prima facie* case of guilt at a preliminary enquiry. This preliminary enquiry takes place at a Police Court or a Court of Petty Sessions, and the general functions of this Court are considered in the next chapter. The Court is presided over by a paid magistrate in London and in the larger towns, and by at least two unpaid magistrates called Justices of the Peace, or J.P.'s, in other areas. They hear the evidence brought to support the charge, and decide whether it is sufficient to justify a committal for trial. It is not necessary for the defendant to put forward any defence. He is entitled to do so, but as the only purpose of the preliminary enquiry is to arrive at a preliminary decision, he may be frequently advised to 'reserve his defence'. Criticism is sometimes offered of a system which is said to require a defendant to undergo two trials. This criticism is founded on false premises, as there are not two trials. The preliminary hearing is *not* a trial, but is conducted for the benefit of the defendant. Unless the Court is satisfied that a *prima facie* case has been established, he is entitled forthwith to be acquitted, and in such a case he is never placed on his trial at all.

In certain cases of a minor character the defendant has no right of trial by jury. All other cases are called 'indictable offences', and some of them, such as murder, manslaughter, rape, bigamy and forgery, must always be tried on indictment before a jury. There are, however, numerous indictable offences, such as larceny, receiving, false pretences, and certain kinds of indecency, when a defendant may be dealt with in the Police Court, if he so wishes. But if he claims his right of trial by jury, he is entitled to it, and in such cases after the

preliminary enquiry has taken place, he is committed to the Sessions or Assizes, if a *prima facie* case is established.

English Law classifies crime either as treason, felony, or misdemeanour. Treason is an attack upon the safety of the State, or the King as its head. The distinction between felony and misdemeanour is hard to define, and in serious need of revision. Broadly speaking, crimes of gravity, such as murder, manslaughter, theft, embezzlement, and forgery, are classified as felony, and lesser offences are called misdemeanours, but the changing character and habits of the community through the years, have resulted in many strange anachronisms in these classifications. For example, riots, bribery, perjury and many serious frauds are all grouped under the heading of 'misdemeanours'. Whatever the nature of the offence, however, it must be precisely specified in the 'indictment' when a defendant is committed for trial. In a case of gravity the Court may give directions for a defendant to be represented by solicitor and counsel, at the expense of the State, if he himself is unable to pay for their employment. It is sometimes suggested that lawyers who accept this task are no match for leading members of the Bar who may be briefed on behalf of the Crown. This charge is not a fair one. In many cases, eminent members of the Bar undertake the defence, and few prisoners who are so defended have reasonable grounds to contend that it is not adequately conducted, even if they are subsequently found guilty.

A defendant may be tried at the Central Criminal Court, at Assizes, or at Quarter Sessions. The Central Criminal Court, or the 'Old Bailey', as it is usually called, has general jurisdiction to try defendants in respect of offences committed, roughly speaking, in the Greater London area, or outside of England. Cases of exceptional importance may also, on occasion, be tried at the Old Bailey. The Court is presided over either by a High Court Judge, or by one of a number of Judges who have been specially appointed. Assizes are held at the County Towns in England and Wales three or four times a year. They are usually presided over by a Judge of the High Court, who travels from London, and they have jurisdiction

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to deal with civil, as well as criminal cases. County Quarter Sessions are composed of Justices of the Peace, presided over by a paid Chairman, who is a lawyer, and cases at Borough Quarter Sessions are tried by a Recorder, a judicial official, who is usually a practising barrister.

When a defendant is sent for trial, he may be committed either to the Old Bailey or Sessions in London, and to Assizes or Quarter Sessions outside of London. Although the less serious offences are frequently tried at Assizes, there is, in general, no hard and fast rule, and sometimes it is a case of expediency as to which Court is likely to give the defendant an earlier trial.

When a defendant is brought up for trial he is placed in the hands of the jury—normally twelve men or women, but reduced during the war to seven. All natural-born British subjects, being men or women between twenty-one and sixty-five, are liable to serve as jurors, if they fulfil the necessary qualifications. Most property owners or rate-payers are qualified, but members of certain professions are exempt from jury service. The names of all qualified persons are marked on the electors' lists, which may be inspected in Town Halls and Public Libraries. If your name is on the list, and you have not had it removed, you are compelled to serve if you are summoned to sit on a jury, even if you are over sixty-five years of age.

When you are on a jury, and you take your place in the witness-box, you will be sworn 'So help me God', without fear or favour, to try the issue joined between 'Our Sovereign Lord the King and the prisoner at the bar'. The jury are not lawyers, and are not asked to decide upon questions of law. It is their function to try issues of fact, and the law is left to the Judge. It is his duty to safeguard the defendant, by refusing to allow any evidence to be heard which is not given in strict accordance with the rules of evidence. In criminal cases, these rules operate almost entirely in favour of the defendant. Hearsay evidence is never admissible. Richard Roe as a witness must not say, 'I was told by Mr. Doe that he saw the prisoner take the

stolen jewellery'. The only person who is entitled to give this evidence is Mr. Doe himself. The reason is that every witness must submit himself to cross-examination—*i.e.*, examination by the opposing Counsel—in order that the truth of his statements may be tested. If Richard Roe were permitted to give evidence of statements made to him by John Doe, Counsel would have no opportunity of testing the truth of the statements.

When John Doe says, 'I saw the prisoner take the stolen jewellery', his evidence is called direct evidence. When he says, 'I saw the prisoner leave the premises, and a few seconds later I heard the jeweller call out that a diamond brooch had been stolen', the evidence is called circumstantial. It is frequently impossible to obtain direct evidence of a crime, and circumstantial evidence—*i.e.*, evidence from which it is fair to draw inferences of fact—is admissible, even although the same weight is not to be attached to it as to direct evidence.

Another rule of evidence, particularly applicable to criminal cases, does not allow anything to be said during the course of the trial as to any previous conviction recorded against the defendant, or to suggest he is of bad character, unless he himself has put his character in issue by giving evidence of good character, or has attacked the character of a witness for the prosecution. This rule is imposed to protect a defendant of bad character from the prejudice of a jury learning of a previous conviction. If such evidence were allowed it would tend to relieve the prosecution of its bounden duty to prove the guilt of the defendant in respect of the specific charge for which he is on trial. For the same reason, the failure of the defendant to give evidence in his own defence must not be criticised by Counsel. Nor may the prosecution normally refer to any statement by the defendant confessing his guilt, unless, as previously stated, it is abundantly clear that when it was made, the defendant fully appreciated the possibility of its subsequent use in evidence against him. It is entirely his prerogative to give evidence if he so desires, and there is no obligation upon him to do so.

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When the evidence has been concluded, the jury will hear speeches from the Counsel engaged in the case, and after Counsel's speeches have been delivered, the Judge will 'sum up' the case to the jury. This means that he must summarise the evidence, and direct the jury on the matters which they have to take into consideration, before they arrive at their decision.

The jury must always endeavour to remain impartial, and to keep an open mind, until the conclusion of the case. After the summing up, and when they retire to consider their verdict, they should endeavour to arrive at unanimity, as otherwise they must be discharged from giving a verdict, and the trial will have been abortive. In considering their verdict, it is not part of the function of a jury to take into consideration the consequences of a verdict of 'guilty'. The punishment which follows the verdict is a matter for the Judge, acting according to defined rules. The jury, however, have the right to make a recommendation to mercy if they so desire, and in a case in which a plea is made and supported by evidence that the prisoner was insane, they may return a verdict of 'guilty but insane', meaning that he was unable to understand and appreciate the nature of his acts at the time when the crime was committed.

If a jury disagrees and is discharged, a fresh jury may be convened to re-try the case. If the second jury fail to reach agreement, the prosecution will almost invariably withdraw the prosecution.

Since the jury are only entitled to find against the defendant if there is evidence to support the finding, it is the duty of the Judge, as a matter of law, to withdraw a case from the jury, or to direct them to return a verdict of 'not guilty', if there is no evidence to support a verdict of 'guilty'. If, however, there is some evidence to justify conviction, it is for the jury to decide whether the evidence satisfies them, beyond all reasonable doubt, that the defendant is guilty of the offence with which he has been charged. There is no such thing in law as 'giving the defendant the benefit of the doubt'. When a Justice of the Peace expresses himself in this way, he

shows his lack of legal training, for if there is insufficient evidence to justify conviction, the defendant is entitled to acquittal as of right, and not as a benevolent favour.

If a defendant is found not guilty, he is entitled to his immediate discharge, and the case is finished and cannot be reopened. The prosecution is not entitled to appeal from the verdict, and if new evidence comes to light on the following day, there is nothing to be done about the matter. A defendant may never in any circumstances be tried a second time for an offence of which he has once been acquitted.

If a verdict of guilty is returned, the case is not, however, necessarily at an end. A convicted prisoner is entitled to appeal to the Court of Criminal Appeal, on a question of law. He is also permitted to appeal on the ground that his sentence is excessive, although in that event the Court may increase the sentence, if they do not agree with his views, and consider that the trial Judge has been unduly lenient. A prisoner is not, however, permitted to appeal when he disputes a finding of fact, as facts are for the jury to decide, and it is not ordinarily the function of any Judge to reverse the decision of a jury. The prisoner is entitled, however, to contend that the Judge 'misdirected' the jury—*i.e.*, that he did not put the case properly before them—when he delivered his summing up, or he may appeal on the ground that evidence was improperly admitted, or that during the course of the trial the Judge arrived at an erroneous decision on a question of law. It is also permissible for him to submit that there was no admissible evidence on which it was possible for the jury to find a verdict of guilty. For example, suppose the jury had returned their verdict on the evidence of Richard Roe, as the only witness, and his evidence had been that he was told by John Doe that he had seen the prisoner stealing the jewellery. This, as stated, is inadmissible evidence. No Judge would in fact admit it, except in a moment of mental aberration, and if he had, in fact, done so, the Court of Appeal would upset the verdict. In some cases an appellant may argue that the verdict of the jury was perverse. He may contend that no reasonable body of men could possibly have

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returned a verdict of 'guilty', on the evidence. As, however, the Court of Appeal does not interfere with a verdict when there is properly admissible evidence on which the conviction could be founded, it will be very slow to allow an appeal in such a case. It will not do so because it might itself have arrived at a different decision. It is the privilege of a prisoner to be tried by his equals, and he is not entitled to appeal from their verdict, if it does not suit him, provided the rules governing the trial have been strictly observed.

An appeal from the Court of Criminal Appeal will lie to the House of Lords in exceptional cases only. Leave to appeal must be obtained from the Attorney-General, the principal Law Officer of the Crown, and it will be granted only in a case which involves a point of law of exceptional public importance.

We may summarise a prisoner's position by describing the protection given to him as 'the seven safeguards', viz.—

(1) The prisoner is deemed to be innocent until he is proved to be guilty.

(2) The prosecution must prove its case by admissible evidence, and not by assumptions.

(3) The prisoner may not ordinarily be placed upon trial, unless a preliminary hearing has established a *prima facie* case of guilt against him.

(4) The prisoner may ask for free legal defence in any case of gravity, if he is himself unable to afford the expense.

(5) No evidence adverse to the character of the defendant may generally be placed before a jury, and no adverse comment may be made by Counsel, if the prisoner elects not to give evidence in his own defence.

(6) The verdict of the jury must be unanimous.

(7) The prisoner has a right of appeal on a question of law.

When all these are taken into consideration, is it reasonable to say that the key turns too easily to confine the prisoner within the four walls of his cell?

THE ADMINISTRATION OF JUSTICE

'Law and Legal Procedure have always been a mystery to the uninitiated, a snare to the unwary, and a red rag to the unhappy man possessed of reforming zeal.'

Viscount Buckmaster

JUSTICE in England is administered in a number of different legal Courts, and, almost without exception, every Court is open to the public. In many instances, the jurisdiction of the several Courts overlaps, and a cursory survey must, accordingly, leave entangled many of the intertwined threads.

The function of the Petty Sessions, or Police Courts, as they are popularly called, when acting as a Court of preliminary enquiry, has been considered in Chapter 29. A Police Court has, however, jurisdiction in many other matters. For example, it deals with almost all petty criminal offences, including such 'crimes' as minor infringements of the motoring laws, 'drunks', and other offences punishable by fines, or a term of imprisonment not exceeding three months. Much of this criminal business is artificial in character, for some of the laws introduced for the welfare of the community bring defendants to police courts who are by no means 'genuine criminals'. Indeed, many motorists, who have never killed a pedestrian, regard it as an insult to be charged with exceeding a speed limit of 30 miles an hour in a built-up area. In similar manner, some druggists who sell patent medicines are pained at being required to consider the health of their customers, as a result of regulations contained in the Public Health Acts. The Food and Drugs Acts also create many criminal offences designed to catch those who sell adulterated milk and impure foods, which are not in accordance with the descriptions under which they are sold. When we are all saints, these enactments will no longer be necessary, but as many of us are still sinners, the law deems it proper to restrict our power to inflict harm on our fellows, and when we commit offences of this type we are charged at a Police Court.

In addition to their criminal jurisdiction, Police Courts have limited powers of trial in specified civil matters. These include disputes arising in certain cases between landlord and tenant, and between employer and employee, and in totally different categories, applications for affiliation or bastardy orders, and a large number of matrimonial disputes, when a wife is asking for maintenance or a separation order.

The Justices who sit to administer justice in the Police Courts, outside of the London area and the larger cities, are always unpaid. They have not necessarily any legal knowledge, but are usually appointed as a reward for political services. It is reasonably argued that it is bad policy to leave the administration of justice in the hands of a layman. It would be equally illogical to leave the navigation of a ship in the hands of a company director, and no one of intelligence would advocate such a course. In defence of the system, it is said that the majority of offences brought before a magistrate are of a trivial character, and turn on questions of fact, as distinct from law. It is therefore contended that it is not essential for a magistrate to be a lawyer. If this argument were sound, it would suggest that many actions in the High Court might also be tried without the assistance of a qualified Judge, since a substantial percentage of them raise issues of fact, as distinct from issues of law. The argument is unsound because a trained legal mind is more capable of sifting relevant from irrelevant facts, and it is to be deplored because it suggests that there is one law for cases of minor importance, and another law for those which involve serious issues.

When questions of law arise in a Police Court, the J.P.'s are usually guided by an official called the Clerk of the Court. He is normally a solicitor who has an intimate knowledge of the business of a Police Court, and a prudent J.P. leans heavily on his clerk, when legal problems are involved. The system, however, inevitably results in a travesty of justice at times, and the abolition of the practice of appointing an irresponsible amateur to a position of judicial responsibility is eagerly awaited by many lawyers. Their wishes may, moreover, be fulfilled at an early date, since a Royal Com-

mission was set up in June 1946 to consider and report on the present situation.

An appeal lies in many cases from the decision of a magistrate to 'Quarter Sessions'. This is the Court referred to in the preceding chapter, which tries many criminal offences. Appeals from a Police Court are not, however, always heard at Quarter Sessions. If a question of law is involved, the magistrates may be asked to 'State a Case' for the opinion of the High Court. This means that they must prepare a statement of the facts upon which they have based their legal decision. The 'Case' is submitted to a Court called the Divisional Court, presided over either by two or by three High Court Judges. They will decide whether or not, in their view, the magistrates have correctly interpreted the law.

The County Court is a Court of civil jurisdiction. There are over 400 of them throughout England, and they sit in the more populated areas, presided over by a Judge who has been selected from among practising barristers. They have jurisdiction to try actions when the amount in issue between the litigants does not exceed £100, or in certain cases £200, and they have jurisdiction in 'equity' matters up to £500. They are also empowered to settle disputes relating to land of an annual value not exceeding £100, and to deal with all cases arising out of the Rents Restrictions Acts. They may try other actions, with the consent of the parties, even when the amount involved in the dispute exceeds the prescribed limits, and some County Courts also have jurisdiction in Bankruptcy and Admiralty business. Although, however, the County Courts deal with a wide range of disputes, they have no power to try actions of libel and slander, breach of promise of marriage, or seduction.

Actions in a County Court, commenced by a document called a 'Plaint', are usually tried within two or three months. On the date fixed for trial, the parties will attend with their lawyers and their witnesses. The arrangements are not always perfect, however, as a case may be adjourned for want of time, when other actions are fixed for hearing on the same day and at the same time. This is a practice which prevails in

every Court in the country, for it is, unfortunately, one of the principles which dominates the English legal system, that a litigant and his lawyers must wait upon the pleasure of the Court, and are not entitled to receive an appointment for the trial which will be kept in the same way as other business appointments.

County Courts in their present form were established in the year 1846 as Courts for the poorer class of litigant. To-day, however, County Court litigation is, unfortunately, not always economical, although costs are on a substantially lower scale than those allowed in the High Court.

An appeal on a question of law lies from the decision of a County Court to the Court of Appeal, but leave to appeal must be obtained, when the amount involved in the dispute does not exceed £20. There is no appeal on a question of fact.

The Supreme Court of Judicature, or the High Court of Justice, known as the 'Law Courts', has its headquarters in London. The High Court is divided into three main divisions, which are called the 'King's Bench Division', the 'Chancery Division' and the 'Probate, Divorce and Admiralty Division'. Probate work is linked with divorce work, as both were previously undertaken by the Ecclesiastical Courts, which alone had jurisdiction to deal with wills and matrimonial disputes. Admiralty work previously left adrift on the uncharted ocean of the law has now found an anchorage with the Probate and Divorce Division, where it is tied up alongside of matrimony. A soldier who recently altered the heading of his divorce petition 'Probate Divorce and Admiralty Division', by substituting the word 'Military' for 'Admiralty' was not devoid of intelligence.

The King's Bench Division deals principally with actions which arise out of contracts and torts—i.e., Common Law actions. Attached to this Division are the Divisional Court and the Courts of the Official Referees. An *Official Referee* is deputed to deal with cases which involve massive detail or complicated accounts, and he is not to be confused with the *Official Receivers*, who are Bankruptcy and Company

liquidation officials. Chancery Courts have taken the place of the Courts of Equity described in Appendix r. They usually try actions dealing with the construction of wills, settlements, and other documents, the administration of trusts, and disputes which relate to mortgages or the sale of land. Bankruptcy business and Company business (including the liquidation of Companies) have also been assigned to the Chancery division.

In many instances there is overlapping between the Chancery and the King's Bench Division. Actions relating to copyright may, for example, be commenced either in King's Bench or in Chancery. There is no hard and fast rule, but, broadly speaking, the influence of the old practice which made damages the particular province of the Common Law still prevails. Accordingly, a litigant usually commences his copyright action in the King's Bench Division when he hopes for substantial damages. If, however, his principal aim is to establish his legal right—the survival of the earlier function of Equity—he usually brings the proceedings in the Chancery Division.

There is an unconditional right of appeal to the Court of Appeal from a final judgment of the High Court. The Court of Appeal, which normally consists of three Judges, does not hear the witnesses again, but it reviews all the evidence which has been considered by the trial Judge. It will, usually, be slow to upset a judgment which is based upon findings of fact, for the trial Judge has had the advantage of hearing and seeing the witnesses in the witness box, and it is never easy to assess the value of evidence when it is read in black and white. Occasions, however, do arise when the Court of Appeal decides that undue weight has been given to irrelevant evidence, and if it is of the opinion that the Judge has arrived at an erroneous conclusion of fact, or has drawn untenable inferences from the evidence, it may reverse his decision. In many instances, when a judgment has been based upon the exercise of discretion, the Court of Appeal will be reluctant to interfere, and it will not do so unless the discretion has been exercised upon wrong legal principles. For example, when a petitioner

in a divorce suit has himself committed adultery, he is not entitled to a decree as of right, but only if the Judge exercises his discretion in his favour, and if the Judge refuses to do so, the Court of Appeal will not normally interfere. If, however, it can be shown that the Judge manifestly acted upon wrong principles in arriving at his decision, it may be persuaded to do so. For example, if the Judge had refused Joan Doe a decree of divorce in a discretion case, because he was under the mistaken impression that she wished to live in adultery with Richard Roe, a married man, when, in fact, Richard Roe had been divorced by his wife, and intended to marry Joan Doe, the Court of Appeal might be asked to allow an appeal. It could do so on the ground that the Judge had exercised his discretion on a wrong principle.

When an appeal is based upon alleged errors of law, the question of discretion does not arise. Full consideration will be given to the judgment from which the appeal is made, but the legal issues will be investigated afresh, without any bias in favour of the existing judgment.

An appeal from a decision of the Court of Appeal lies to the House of Lords. In some cases such an appeal may be made without leave, but in others, the leave of the Court of Appeal must first be obtained. This will usually be granted, if substantial issues are at stake, or if there has been a marked divergence of views among the Judges themselves. It will not, however, be so readily granted if all the Judges have been unanimous in their judgments.

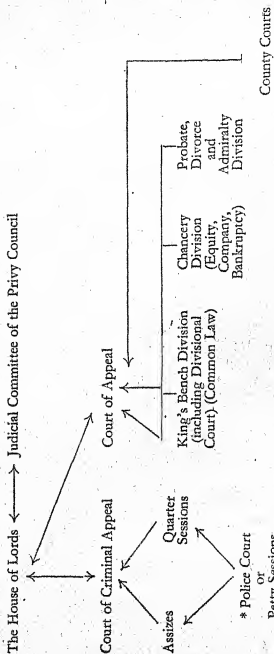
The House of Lords is the final appeal tribunal of the country. The Court usually consists of five Judges who have been appointed peers, and are known as Law Lords. Technically, the hearing of an appeal is a sitting of the House of Lords. When the arguments in the case have been considered, the Law Lords do not deliver judgment. The Lord Chancellor, who presides, 'moves' that the appeal be allowed or dismissed, as the case may be. The other Law Lords then speak to the motion, and either support it or oppose it. The majority verdict will decide the issue.

There is another appellate court, which deals with appeals

from the Appeal Courts of the Empire, other than Eire. It is known as the Judicial Committee of the Privy Council. This Court is also usually composed of five Law Lords. They never deliver a formal judgment, but after they have expressed their views, they 'humbly advise His Majesty' to allow or reject the appeal. The Privy Council is a valuable link with the British Commonwealth of Nations, and it has such extensive powers that a man sentenced to death in any part of the Empire may have a right of appeal to the Council, if some legal point of exceptional public importance is involved, or if the trial was conducted without regard to natural law and justice, as it is understood in this country.

The diagram on the next page may help to clarify the links connecting the different courts, but it does not include a number of other courts of local importance which have not been included in this survey.

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* In certain cases an appeal from a Police Court on a question of law may be heard by a Divisional Court.

TRIALS AND ARBITRATIONS THE FUNCTIONS OF A WITNESS

"Little to do and plenty to get, I suppose?" said Sergeant Buzfuz with jocularly.

"Oh, quite enough to get, sir, as the soldier said when they ordered him three hundred and fifty lashes," replied Sam.

"You must not tell us what the soldier, or any other man said, sir," interposed the Judge; "it's not evidence."

Pickwick Papers

EVERY action in the High Court is initiated by the issue of a formal summons to the defendant called either a 'writ of summons', or an 'originating summons'. This usually contains a short precis of the nature of the complaint and the 'relief' which the plaintiff proposes to ask the Court to grant. Legal proceedings must always be commenced within a definite period from the date when the cause of action arose. For an ordinary contract this period is six years, and a similar time prevails in many other instances. The subject is dealt with by the Limitations Act 1939, and the tricky exceptions which sometimes bring the public to grief are the limited periods of twelve months permitted both in respect of any action against a Public Authority—e.g., a Borough Council, or other official or semi-official body—or in a claim for damages after a fatal accident. A writ must be personally served upon the defendant, unless he has authorised a solicitor to accept service of the proceedings on his behalf. A plaintiff is not entitled to relief before a writ has been served except in cases of emergency. An '*ex parte*' injunction, as it is called, i.e., an injunction obtained without previous notice to the defendant, is only granted when irreparable injury might otherwise be caused.

If the defendant does not, in due course, enter an appearance to the proceedings, the plaintiff is frequently entitled to judgment. There are many cases when the defendant

appears, although he has no defence to the action, because he wishes to gain time. The plaintiff may then frequently make an application for 'summary judgment'. Before he does so he must swear an affidavit, which will, in such a case, contain statements to the effect that the debt is owed to him, or that he is entitled to the other relief for which he asks, and that he does not believe the defendant has any defence to the action. An affidavit is always sworn before a solicitor who has been granted a Commission to administer oaths, but a client is never permitted to swear an affidavit before his own solicitor. This practice was presumably adopted to avoid the risk of a conspiracy between the solicitor and his client to swear a false affidavit.

If the defendant wishes to resist an application for judgment, he must also swear an affidavit, giving particulars of his defence. If he does not do so, judgment may be given against him. When, however, the contents of the defendant's affidavit would, if true, afford an answer to the claim, or even a case for legal argument, the 'Master'—the Court official who hears the application—must give the defendant leave to defend the action. It is not his function to decide the strength or weakness of the defendant's case, and he has no power to do so.

When a defendant obtains leave to defend an action, there are a number of interlocutory proceedings which must take place before the action is entered for trial. These relate to what are called the 'pleadings'—*i.e.*, the particulars of the claim and the defence—'discovery'—*i.e.*, the disclosure by each party of all the documents in his possession which have any bearing on the issues in the action—and other incidental matters. All these are subject to strict regulations, and the rules of procedure in the High Court, which consist of over seventy principal 'Orders', govern every step in an action. When you are informed that the annual publication of these orders, with notes and annotations, results in a volume of over 3,000 pages, you will understand why lawyers who are concerned with Court work are not immune from headaches!

When you are involved in litigation outside of London,

your action may be tried at Assizes. If your case is to be heard in London and your action has been entered for trial, you take your place at the end of the queue, and several months may elapse before you reach the head of the list. Like the patient housewife, however, your turn will eventually come, and, in the meanwhile, your solicitor will have delivered a brief to the Counsel who is to argue the case on your behalf, and you will probably have had one or more conferences with him. A notice is published at the Law Courts each evening of actions which are to be tried on the following day. When your case is in the list, and the Judge has disposed of other actions, if any, which are set down to be heard before him at precisely the same time on precisely the same day, your case will be called by the Clerk of the Court, and if you are the plaintiff, you will probably see your Counsel rise from his seat. As a general rule, the onus of proving a case rests upon the plaintiff, and it is therefore usual for plaintiff's Counsel to open the case and to outline to the Judge the nature of the complaint and the evidence which he proposes to tender on his client's behalf. If you are excitable, you should not be disappointed with your Counsel, if he appears to be cold and unemotional. A prudent Counsel will never present an exaggerated case, which cannot be supported by the statements of his witnesses.

When Counsel has finished his opening address, he will call his first witness into the witness-box, and the procedure is the same whether the action is tried in the High Court or the County Court.

Laws lay down precepts or rules for the governing of the community and the adjustment of disputes. The laws may be excellent, but unless there is an efficient system for their administration, they may be of little practical value. In England, the witness-box is the foundation upon which the system has been built. In every trial the evidence which is produced and tendered to the Court from the witness-box is the keystone of the system.

Before a witness gives his evidence he must take an oath :
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Court will be the truth, the whole truth, and nothing but the truth'. In many instances, however, truth cannot be expressed in words. It is abstract and not concrete. If you are a plaintiff, and your action has been brought to recover damages for injuries sustained in a street accident, there may be an issue of fact as to the speed of the car which has knocked you down. It cannot be equally true to say that the car was travelling at 10 m.p.h., and that the car was travelling at 30 m.p.h. You may give evidence that the car was travelling at 30 m.p.h. and you may have an honest belief that your evidence is true. The driver of the car may give evidence that it was travelling at 10 m.p.h. with a similar honest belief. If you substitute the words 'fast' and 'slow' for exact speeds, you will be no nearer the truth, since both terms are relative. You will not be determining the truth, and you will not be making any attempt to clarify the issue of fact. You can never be sure of arriving at the truth, for even if the driver were able to produce a photograph of the speedometer reading at the precise moment of the impact, no one could say whether or not the speedometer was recording accurately at that moment.

For these reasons, it would be more satisfactory if the oath was not administered in such uncompromising terms, and if a witness were permitted to qualify his oath by the addition of the words 'to the best of my honest belief'. If a witness is determined to give false evidence, it is disturbing to think he may quieten his conscience by the reflection that the oath which he is obliged to take requires him, before God, to achieve the impossible. The same criticism applies to every affidavit that is sworn.

Evidence, as intimated, is usually the central feature of an action. A witness may attend Court voluntarily or he may be compelled to do so by 'subpœna'—i.e., he may be served with a summons which requires him to attend, and if he has been paid 'conduct money' to bring him to Court, and he fails to appear, he may be charged with contempt of Court. After the trial he is entitled to a witness fee and his expenses.

It is advantageous for a witness to understand and appreciate his duty to the Court, before he goes into the witness-box. There are some good witnesses, and many bad ones. Here are some suggestions which every witness might usefully note.

(1) It is the duty of a witness to recount facts and not, generally speaking, to express opinions, unless he is an 'expert witness'—*i.e.*, a witness called to testify on a technical matter, of which he has expert knowledge. It is true that on occasions a reply is necessarily a matter of opinion, as in the case of the witness who is asked whether a car was travelling at a fast or a slow speed. His answer is only able to reflect his personal view, and the Judge will normally attach little weight to his opinion. If, on the other hand, you are the witness, and are able to say: 'The near mudguard of the car hit the plaintiff's left thigh', you are deposing to a fact. It may not be true, of course, because you may be mistaken, but if you are able to speak precisely as to a fact, and your evidence is not contradicted, the Court may be expected to accept it, unless there are other grounds for rejecting it.

(2) A witness should remember that it is not his function to make speeches. It is his duty to answer the questions which are put to him by Counsel or the Judge. If he is able to answer 'yes' or 'no' to a question, so much the better. If that answer is complete in itself, it is not necessary to add anything more. An answer such as 'Absolutely yes' or 'Definitely no', should always be avoided. Such answers are as unimpressive as a speech. A Judge is not a simple-minded person. More likely than not, he will form an unfavourable view of the witness who tries to impress him. You would probably do the same, if you were in his place. When you meet a stranger, you will not think much of him, if he commences to brag of his achievements, or to bore you with some dull personal reminiscence, before you have been five minutes in conversation with him. A Judge will favour the evidence of a witness who answers questions simply, without evasion, and without making long and irrelevant speeches. It is never the function of a witness

to display his character. He is not an actor. He is a cog in the machinery of the law.

(3) Every witness should direct his mind to the question which is asked of him, before he gives his answer. If a question cannot be answered in a word, the reply should be directed to the question, and should not be an elaborate explanation of something which has not been asked. A witness who fences with questions asked of him may be reprimanded by the Judge, and when this happens, the witness may be sure that he has created a bad impression. The truthful answer may damage the case which the witness is hoping to establish, but an untruthful, or evasive, answer will generally do even more harm. If the Judge does not believe the witness is telling the truth, his evidence will always injure the party on whose behalf it is being given, and may make a substantial contribution towards the loss of the case. If a witness wishes his evidence to be believed, he must satisfy the Judge he is doing his best to tell the truth. It is never advisable to try to deceive the Court. Many of the Nuremberg criminals were accomplished liars in their diplomatic lives, but cut sorry figures at their trial, when they evaded the questions asked of them in cross-examination.

(4) You should endeavour not to allow prejudice to influence your replies. This is very difficult. If there were no prejudice, the task of arriving at the facts would be greatly simplified. We may 'smack against the rock of prejudice' in many ways. For example, each of us makes a number of mistakes daily. On these occasions there is an inevitable tendency to pretend the fault is not entirely ours. Someone else has been partially responsible. The pedestrian knocked down by a car is rarely ready to admit any responsibility. The driver of the car will be equally unwilling to accept liability. One blames the other, and the attempt to pass the baby aggravates the prejudice which each feels against the other. Pride, closely associated with prejudice, also plays its part in such a case. When we know we have made a mistake, pride makes us obstinate and does not permit us to admit it. We do not realise how easy it is to

disarm an opponent by the simple words, 'I made a mistake. I'm sorry.' We fight shy of such an admission, and the more the accusation is pressed, and our fault brought home to us, the more obstinate and prejudiced we become. On such occasions, many a witness, cross-examined by a clever Counsel, has been so swayed by prejudice as to give answers which no reasonable man would believe to be true.

(5) Avoid exaggeration. Exaggeration is frequently a symptom of indignation, but evidence of indignation is never proof of the case which a witness seeks to establish. Moreover, an indignant witness is seldom impressive, since indignation may be so often simulated consciously, or unconsciously, in order to conceal shortcomings.

(6) Hearsay evidence being inadmissible, the witness must not make statements as to what he was told by a third party.

(7) Speak clearly and not in a whisper, and face the Judge when you answer questions, even although they are put to you by Counsel.

After a witness has been examined by his own Counsel, he will be cross-examined by the Counsel for the opposing party. After his cross-examination has been concluded, his own Counsel is entitled to re-examine him in order to clarify any answers given in cross-examination which may be capable of better explanation.

After the first witness has concluded his evidence, the plaintiff's Counsel will call his other witnesses, and when they have concluded their evidence, the plaintiff's case is said to be closed.

The defendant's Counsel will then open his case, and may outline his defence, before he calls his witnesses. His witnesses will be subject to the same examination and cross-examination as the plaintiff's witnesses and after their evidence is concluded, the defendant's Counsel will argue his case before the plaintiff's Counsel has the last word.

In their final speeches, each Counsel endeavours to persuade the Judge to his point of view. In many cases, how-

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ever, the issue has already been decided before the last witness has left the witness-box. If the case is one which turns on issues of fact, the Judge will have formed his own impression of the veracity of each of the witnesses. The most eminent Counsel is unlikely to be able to persuade him to change his opinion. Although it is the duty of a Judge to keep an open mind until the last word has been spoken, it is also his duty to decide the case on the evidence, and he must not be influenced by the seductive oratory of Counsel.

If issues of law, as well as issues of fact, are involved, the decision of the Judge must, of course, depend in part on the skill with which Counsel presents his arguments in support of his legal submissions. In such a case it may be truly said that a case is never lost until it is won. A final speech made by Counsel for the plaintiff frequently rescues an apparently lost cause.

The system of trial may not be perfect. A witness, nervous through no fault of his own, will always be at a disadvantage. No one, however, has yet found any better procedure. It certainly would not be satisfactory to excuse a witness from giving evidence because he is too timid to face Counsel. To yield to the desires of a nervous witness would undermine the system, and make it impossible to conduct judicial proceedings with any pretence of efficiency.

After a judgment has been obtained, there are a number of ways in which it may be enforced, always bearing in mind that 'you can't get blood out of a stone', and if a defendant is ordered to pay a sum of money, and is without means, no lawyer knows of any magic formula which will enable the plaintiff to enjoy the fruits of the judgment. If, however, a defendant has 'prevaricated, or said nay', the more usual methods taken to enforce the judgment are (1) to levy execution on his goods, (2) to institute bankruptcy proceedings, (3) to 'garnishee' his banking account, if his Bankers are known. Chapter 7 has dealt with Execution and Chapter 21 has dealt with Bankruptcy. 'Garnishee' is a procedure by which the judgment debtor's banking account is attached. If there are any funds standing to his credit,

the Court may order them to be diverted, for the purpose of satisfying the judgment either in whole or in part. There are other steps which may also be taken to enforce a judgment, but they are not so frequently employed.

Arbitration is an alternative procedure to litigation, and it may take place when both parties agree to adopt this form of procedure for the settlement of their disputes.

Contracts frequently include a clause which provides for reference to arbitration of any dispute arising between the parties on matters arising out of or incidental to the contract. In such cases the decision of the arbitrator is usually final and binding on the parties. Sometimes a clause of this kind provides for the appointment of an arbitrator by each party to the dispute, with the right to the two arbitrators to appoint an umpire in the event of disagreement. This involves additional expense, which will be avoided if the submission provides for the appointment of a sole arbitrator. Every agreement to arbitrate is called a 'submission', and although the Court has power to make an order staying legal proceedings commenced by a party who has agreed to submit disputes to arbitration, it will not compel a litigant to arbitrate, if he has not so agreed.

Arbitration, as an alternative to litigation, has both advantages and disadvantages. It is particularly appropriate in dealing with disputes which arise between parties to a commercial contract. It enables them to dispose of the dispute without publicity which may be harmful to both. It is also in many ways more expeditious than litigation, for an early hearing can be obtained, and the parties may be reasonably sure that the trial will take place on the fixed date. The advantages are, however, sometimes outweighed by the disadvantages. For example, the general belief that it is cheaper to arbitrate than to litigate is often erroneous. In many cases an arbitration is substantially more expensive than a law-suit. The principal item which contributes towards the increased expense is the arbitrator's fees, and in some cases those of the umpire. A skilled expert, appointed

to act as an arbitrator, may properly charge substantial fees for his services, but there is no corresponding item payable when an action is tried before a Judge.

There may also be a disadvantage in arbitration, when difficult questions of law are involved. Either party is entitled to require the arbitrator to 'state a case' for the opinion of the High Court. This corresponds to the procedure referred to in Chapter 30, when a Magistrate 'states a case'. When this is done, it involves the added expense of what is, in effect, a second hearing of the dispute. Moreover, although provision may be made in some cases for the appointment of a qualified lawyer to act as arbitrator, there may be other instances in which the arbitrator has no legal training, and no experience in conducting a trial. Sometimes, also, he may know nothing of the duty of 'cold neutrality' which his position imposes upon him.

The rules which govern arbitrations are laid down in the Arbitration Act 1889/1934. These rules are designed, as far as possible, to assimilate the procedure to that of a trial in the High Court, for every arbitration is and must be conducted as a judicial proceeding. As a general rule, each party will be required, before the hearing, to deliver particulars of the claim, and the answer to the claim, in the same manner as in a High Court action, in order that the issues may be clearly defined. Each party will also be required to disclose to his opponent, before the trial, all relevant documents, so that neither party will be taken by surprise at the hearing. Although it is not essential to instruct lawyers on an arbitration, it is usual to do so, unless the dispute is of a trivial character, or the arbitration is being conducted informally, according to practices which are customary in certain trades.

After the arguments have been concluded, it is customary for the arbitrator to notify each party when he has arrived at his decision, and he will require payment of his fees before handing over or 'publishing' the award. The award, which must be stamped with a 10s. stamp, will, however, frequently direct the losing party to pay the costs, including the arbitrator's fees, and if the winning party has already made

the payment, he is then entitled to claim reimbursement from his opponent.

If the losing party to an arbitration refuses to carry out the terms of the award, an order may be obtained from the High Court to compel him to do so. An award of an arbitrator, lawfully published, is as effectual as an order of the High Court, and the Court will always make an order for its enforcement, unless there has been fraud or irregularity in the conduct of the arbitration.

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COSTS

'The first thing we do, let's kill all the lawyers.'
King Henry VI, Part 2, Act 4, Sc. 1

LEGAL charges do not consist exclusively of solicitors' costs. They may also include barristers' fees, witnesses' fees and Court fees. Many people, when they speak of heavy legal charges, have the impression that all the money goes to solicitors. They forget, or do not know, of the other expenses included in the bill.

The costs which a solicitor is entitled to charge his client are regulated by Statute. The Law Society—the body which regulates the activities of solicitors (but not barristers)—adopts a critical attitude towards any who agree, except from charitable motives, to carry out work at less than the approved rates. The Law Society is sometimes spoken of as the strongest Trade Union in England, and it has power to take disciplinary action against any solicitor who infringes the law or is guilty of professional misconduct.

The Solicitors' Remuneration Act 1881 is the principal Act of Parliament regulating solicitors' charges. This provides a standard rate of 10s. for each attendance in matters of a non-litigious character, and 6s. 8d. for each attendance in a litigious or Court matter. It also prescribes an *ad valorem* scale of charges which applies in respect of conveyancing transactions—i.e., those that relate to sales, purchases, mortgages and leases of property. In each of these cases the costs are based upon the amount of the money involved in the transaction. In 1881 titles to land were not registered, and the scales of costs now allowed for transactions relating to registered land are on a much lower basis. Some specimen extracts are set out at the end of this chapter showing the charges allowed to solicitors when registered and unregistered property is bought, sold, leased and mortgaged.

In 1881 you were able to purchase much more with £1

than you can in 1946. Moreover, in 1881 wages and salaries in professions and trades were all on a meagre scale. A competent solicitor's clerk, who might have earned 50s. a week in 1881, will have no difficulty in finding employment at £6 or £7 a week in 1946. Even if we leave income tax out of our calculations, since it is a communal charge and affects every member of the community, overhead expenses, such as rents, rates, lighting and heating, are all substantially heavier than they were in 1881. Solicitors' charges have not increased in proportion to the increased cost of living. Following an extra allowance of 33½% after the last war, a further increase came into operation in 1944 authorising solicitors to charge 50% more than the rates permitted sixty-five years ago.

A client receives professional services from his solicitor in return for the fees which he pays. In the great majority of cases, legal business is completed to the satisfaction of both parties. A conscientious lawyer will do his best for his client, and the client will have confidence in his solicitor. The client will be wise, however, to remember, when he takes legal advice, that he ought to accept it, even if it is unpalatable, for it will be based on years of practical legal experience, which he himself does not possess. In all cases of difficulty and doubt, Counsel's opinion may be taken, and although this will not reduce the matter to certainty, it will afford additional clues to the best solution. If, in fact, the client has no confidence in his lawyer, he is always at liberty to seek other advice, and the sooner he breaks the relationship, the better it will be for both parties. Clashes of temperament may occur between lawyer and client, in the same way as between other members of the community, and neither should feel aggrieved when they part company in such circumstances. In an exceptional case, if there has been some default on the part of the solicitor, the client may have a claim against him for damages for negligence. If the default is of a more serious and of a fraudulent character, the client may seek redress from the Law Society. If a solicitor abuses his responsibility, the

Law Society will not only, as stated, call him to account, but will also, in appropriate cases, in which there has been fraudulent conversion of the client's money, allow compensation to the client who has been victimised.

There are black sheep and defaulters among every section of society. They are part and parcel of the community. When, however, your neighbour is robbed or defrauded, it is not usually your concern. After you have expressed your sympathy, you usually forget the incident, and you do not undertake to reimburse him for his loss. Solicitors, however, are no longer satisfied to adopt a complacent attitude when a fraud is committed by a member of their own profession. In 1942 they set up a fund to provide compensation to members of the community who had been defrauded by their solicitors. Every Trade Union is properly jealous of the rights of its members, but is there any Trade Union in the country, other than the Law Society, which will stir from its groove in order to reimburse a member of the public for a loss resulting from the fraud of one of its members?

This is not the only way in which solicitors show a practical appreciation of the duty which they owe to the community. For many years both solicitors and barristers have voluntarily assisted in operating a system known as the 'Poor Persons Procedure', under which poor litigants may bring or defend High Court actions without legal expense. In 1945, 16,430 applications for Poor Persons certificates were received in London, and 6,041 in the provinces. Of recent years a majority of all divorce suits have been brought under the Poor Persons procedure. The present normal legal costs of an undefended divorce case are £65 to £85, and this includes solicitors' charges of £40 to £60. You may criticise the expense of obtaining release from an unsuccessful marriage. You cannot, however, reasonably criticise a solicitor who undertakes the conduct of a Poor Person's divorce, and thereby foregoes a fee of £40 to £60. It is also relevant to point out that a substantial proportion of this fee is to be attributed to overhead expenses.

The Poor Persons' procedure deals only with High Court

cases. It applies to members of the community who have an income of less than £4 a week and whose possessions are worth less than £100. A Committee known as the Rushcliffe Committee has recently made sweeping recommendations to widen the scope of these provisions. The report has been favourably received, and it is probable that at an early date the present meagre limits will be substantially extended.

Many lawyers also carry out other voluntary legal work. Barristers and solicitors have formed panels, known as the 'Poor Man's Lawyer', throughout the country, which give advice to those unable to afford professional fees, and steps are taken, in suitable cases, to place applicants in a position to obtain legal redress.

There is also a Committee, known as the 'Bentham Committee', which has been set up in London to assist poor litigants. It maintains a rota of lawyers willing to advise and undertake work in County Courts, for clients who are unable to incur the expense of such litigation, and it works in association with the Poor Man's Lawyer.

In addition to these Committees, the Services Department, set up by the Law Society during the war, has been overwhelmed with nearly 50,000 divorce cases. It has done its best to cope with the flood under most difficult conditions resulting from staff shortages. Finally, the Service legal aid schemes, giving free advice, have dealt with over 122,000 applications for advice up to the end of 1945. In this way assistance has been given to soldiers, sailors and airmen to cope with every type of legal problem.

These facts will help you to appreciate that solicitors are not primarily concerned with 'fleecing' their clients, as a few uninformed members of the community sometimes contend. In fact, a solicitor usually regards his duty to his client as a trust. Moreover, it is inaccurate to imagine that the practice of the law enables lawyers to make a fortune. When they die rich, their wealth has usually been accumulated as a result of other business interests. In the next chapter a few particulars are given of the long and expensive training which a solicitor must undergo, in the interests of the com-

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munity, before he is permitted to practise. A solicitor who has invested many years of his life in training for his profession is entitled to a reasonable return for this investment.

It used to be the practice for a solicitor to endorse every account which he rendered to his client with the forbidding expression 'This is my bill', and this terse observation was followed by his signature. Unless a bill of costs was so signed he was not able to enforce payment. Even to-day it is necessary for a solicitor to sign his bill to his client, unless it is accompanied by a signed covering letter.

The custom of rendering a detailed bill of costs dates back to the period when lawyers were among the few members of the community who were able to read and write. Their services were retained as 'attorneys' to write letters for their clients. An itemised bill of costs was subsequently rendered, charging for each attendance on the client, and every letter written on his behalf. No charge was made, however, for considering the client's position, or for coming to a decision as to the best course to adopt in any particular case. A solicitor will normally spend a considerable amount of time in concentration upon a problem, but even to-day no allowance may normally be included in the bill for time so spent, nor is there any special allowance given to a solicitor for conducting difficult negotiations. If these are successful, the reasonable client will not cavil at a reasonable fee. A client who lacks appreciation is entitled, however, to object to pay a penny beyond the fixed scale. The practice of submission of the itemised bill of costs, usually irritating both to solicitor and client, has not yet been swept away, although it is no longer habitual, or even necessary, except in litigation.

Every client who receives a bill of costs and considers it excessive is entitled to have it 'taxed'. This means he may apply to the High Court for the bill to be scrutinised by a Court official called a 'taxing officer'. If more than one-sixth of the amount of the bill is taxed off by the taxing officer, the solicitor must pay the expenses of the taxation. If less than one-sixth is taxed off, the client must pay the additional charges of the taxation. Any disbursement

charged in the bill will be disallowed, unless it was either paid before delivery of the bill, or is expressly noted as unpaid.

When you embark upon litigation, it is unfortunate that there are too many unknown factors involved to enable your solicitor to give you a reliable estimate of the maximum costs which you may incur. A solicitor cannot even estimate his own charges with any semblance of accuracy, as they will depend upon the amount of work involved—*i.e.*, the number of hours upon which he will be engaged in the course of conducting the case and preparing for trial—whilst in many cases the disbursements may exceed the amount of the charges.

This chapter is more about solicitors than barristers, because most of your legal associations will be with a solicitor. Barristers have little personal contact with the layman, for they are not allowed to interview clients, except in the presence of a solicitor. A barrister must, however, be briefed in every High Court action, as no solicitor has the right of audience before a High Court Judge in open Court. Counsel, as barristers are called, are classified either as King's Counsel, popularly called 'Silks' (from the nature of the gown which they wear), and Junior Counsel, a distinction which is more particularly described in the next chapter. Barristers occupy a curious legal position. They have no legal right to remuneration, because fees payable to barristers have, from time immemorial, been regarded as gratuities. As a result, of this fiction, a barrister may never sue for an unpaid account. Moreover, a layman will never receive a bill from a barrister. The 'fee note' will always be sent to the solicitor, who is under a moral obligation to pay, and if he fails to do so, after he has been placed in funds by his client for the purpose, he may be reported to the Law Society. A barrister would also, in most cases, refuse to accept any further brief from a defaulting solicitor, unless he received payment of his fees in advance.

Counsel's fees are frequently much heavier than solicitors' charges. Leading members of the Bar demand and receive remuneration far in excess of any allowed to solicitors, and

there is no limit to the fee which Counsel is entitled to require before he accepts a brief. Of course, there is no obligation to employ expensive Counsel. There is, however, a popular idea that if you employ the best Counsel, you are more likely to win your case. This idea is not always erroneous; it is not necessarily always true.

It would be unfair to be too critical of Counsel who demand a premium on brain. Most of us wish to exploit our earning capacity to the full, and if someone is willing to pay us £12 a week, we will rarely be willing to accept employment at £9 a week. Moreover, it is nearly always possible to retain a competent barrister to conduct a case at a fraction of the charges required by the fashionable 'Silks'.

When a King's Counsel is briefed, he is not allowed to appear in Court without a Junior Counsel. This involves additional expense, and the burden is increased by a rule which entitles the Junior Counsel to receive two-thirds of the brief fee paid to King's Counsel, except when the brief fee exceeds 150 guineas. In defence of the system, it is fair to observe that Junior Counsel has a great deal of work in the earlier stages of an action, and he may receive only nominal remuneration for his labour, if the action is settled before the delivery of the briefs. The two-thirds rule accordingly enables him to gain on the swings what he has lost on the roundabouts. Nevertheless, critics of the system are able to make a substantial case, which it is not easy to answer.

Court fees make only a small contribution to the expense of litigation, but witness fees may prove a heavy burden. When a case appears in the list for trial, the parties, the lawyers, and the witnesses must all be available. When, however, the trial is not reached, because earlier cases in the list have not been disposed of, the time which is wasted must be paid for. A few puny efforts have been made to overcome the difficulty, but no satisfactory solution will ever be possible until the existing practice, which, as stated in Chapter 30, requires the litigant to wait on the convenience of the Court, is abolished. In the meanwhile, solicitors, as

the easiest available target, receive the blame, and perhaps this is one of the reasons why they regret that no attempt is made to eradicate such a blot from our legal system.

The award of costs in every action is in the discretion of the Judge who tries the case. Although it is usual to order an unsuccessful litigant to pay his opponent's costs, a Judge may deprive either party of costs for good cause—*e.g.*, an action may be dismissed without costs if the successful defendant has adopted a defence which is devoid of merit, but offers a technical answer to the claim.

Not every unsuccessful litigant is in a position to pay costs, and some efforts have been made to meet this contingency. A defendant to an action brought in the High Court, for damages in respect of a tort, but not a contract, is usually entitled to apply for an order to remit the action for trial to the County Court, upon the production of evidence that it is improbable the plaintiff will be able to pay costs awarded against him, if the action fails. The usual practice is to make the order to remit, unless the plaintiff gives security for a specified sum, to meet this contingent liability. A plaintiff resident out of the jurisdiction—*i.e.*, not resident in Great Britain—may also be ordered to give security for costs in any action in the High Court, and a similar order may be made against a limited liability company when it brings an action, if proof is furnished of its probable inability to pay costs, if unsuccessful in the litigation. Other than in these specified cases, however, there is, as a general rule, no power to order a plaintiff to give security for costs, and a defendant can never be ordered to give security in respect of his defence. If you desire to sue a flea, you must, accordingly, be prepared to find, as a result, that you have only caught a bite.

If you lose an action and are ordered to pay the taxed costs of your opponent, such costs are usually described as 'Party and Party' costs, and it does not necessarily mean that you will be ordered to pay the fancy fees charged by a fashionable Counsel, who may have been retained by your

opponent. When the taxing master taxes the costs, he will allow the successful litigant only such expenses as were necessarily incurred in the conduct of the litigation. Fees paid to Counsel, whose services are at a premium, will frequently be substantially reduced on taxation, and there are nearly always a number of items which the taxing master will strike out as not having been incurred as a strictly necessary expense. Such items are known as 'solicitor and client' charges, and the successful litigant will have to bear them out of his own pocket.

Costs in the County Court are on a much more modest scale than costs in the High Court. They vary according to the amount involved in the dispute. The lowest scale is applicable to actions under £10, and the fees which a solicitor earns for his professional services in such an action are much less than the amount which a bricklayer earns for work occupying a similar time. Members of the community who are involved in petty disputes cannot afford to pay high fees, and, in spite of all that is said to the contrary, the law does try to offer them justice. It is always necessary to remember, moreover, that the law for cases which involve small amounts of money is the same as the law which has to be applied if £10,000 is at stake, and that only a small percentage of actions are started in the High Court, since the great majority are brought in the County Courts.

A few months ago a London newspaper wrote in a leading article: 'The high cost of litigation has been an abuse in England ever since Magna Carta enjoined that "justice shall not be delayed or sold".' An even greater authority observed, 'It is a popular error to imagine the loudest complainers for the public to be the most anxious for its welfare' (Burke).

There are admittedly a number of deficiencies in the legal system, which offer an easy target for criticism. Let us see what sort of argument lawyers are able to put up in answer to a charge that the costs of litigation are excessive.

1. The public would be the first to suffer from cheap litigation. Lawyers, as well as their clients, must eat bread

and butter, and they also enjoy a piece of cake. If they were unable to earn sufficient to provide these sweets of life, they would look elsewhere. Lawyers do not set themselves above human failings, and if you underpay the legal profession, you will unlock the door which leads to temptation and corruption.

2. Litigation is bound under all circumstances and conditions to be a waste of time to the litigants, since they must always be prepared to devote time to their lawyers' requirements, if they wish their cases to be thoroughly prepared and presented. Every dispute which is settled amicably is, accordingly, so much time saved, and in so far as the prospective expense of litigation has contributed to the settlement, it is a point in its favour.

3. Cheap litigation would be of great encouragement to dishonest claims brought by those who had nothing to lose. 'Blackmail' is the colloquial expression used by most litigants when they are sued by a man of straw. This, of course, is not the right term, since the essence of blackmail, one of the most serious criminal offences, is the attempt to extort money or other valuables by threats (usually of exposure of an offence alleged to have been committed by the threatened man). Doubtless, however, the expression represents the opinion of the man 'threatened' with legal proceedings in respect of what he considers is a worthless claim, and American lawyers will testify to the number of fraudulent claims pursued in a country in which law costs little to the plaintiff if he loses his law-suit.

4. Expensive litigation does not act as such a serious deterrent as is popularly represented. In addition to the channels available to poor litigants, referred to earlier in the chapter, there are nearly always lawyers available who are willing to undertake litigation for poor litigants, if the lawyers believe that there is a good cause of action. Although lawyers are never permitted to conduct litigation on a speculative basis—*i.e.*, to make an agreement with their client which permits them a percentage of any money recovered—it is not improper for a solicitor to conduct an action for an

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impecunious client, and to recover his proper legal costs if the action is successful.

5. The County Court scale of costs in small disputes is almost invariably within the means of all litigants.

6. English history has been built on compromise, and democracy is itself a compromise. A system which encourages compromise cannot be entirely devoid of merit.

After stating these arguments, it should be observed that a very low percentage of all legal work consists of litigation. In other business dealt with by solicitors there is not the same startling disproportion between subject-matter and costs. They are normal transactions, but it is a commonplace throughout life that the normal passes without notice and without comment. It is the unusual and exceptional which attracts attention, and it is the unusual and exceptional case which has done much to contribute to the complaint that legal costs are excessive.

To lessen the risk of becoming liable to pay a heavy bill of costs as a result of unsuccessful litigation, I would, as a last general exhortation, urge John Citizen, as a layman, not to assume that the law is what he would like it to be, and not to follow his own inclination on a legal matter. To pursue a false trail based on such a belief often leads to disaster, for there are many real and assumed grievances for which no legal relief can be given. On such occasions there is one and only one prudent course to adopt—viz., to cut your loss. If you do not do so, but fall instead into the grievous error of 'running your head against a brick wall', it may not always crack your skull, but it may leave you with a severe headache for the rest of your life.

SCALE OF COSTS ALLOWED IN CONVEYANCING BUSINESS UNDER
THE SOLICITORS' REMUNERATION ACT 1881 (NOW SUBJECT
TO AN INCREASE OF 50%):

1. *Sale and Purchase of Freeholds and Leaseholds.*

(Titles not registered.)

Vendor's Solicitor. For preparation of contract, deducing titles to property and perusing and completing Conveyance :

Purchaser's Solicitor. For perusal and completion of contract, investigating title to property and preparing and completing Conveyance :

30s. per £100 for the first £1,000 of purchase price.

20s. per £100 for the second and third £1,000 of purchase price.

10s. per £100 for the 4th and each subsequent £1,000 up to £10,000 of purchase price.

5s. per £100 for each subsequent £1,000 up to £100,000.

These charges do not include either the additional costs allowed to a solicitor if he actually negotiates the sale, or the costs of any mortgage.

If the same solicitor acts for both parties he is only entitled to the vendor's charges and one-half of the purchaser's charges.

2. *Leases.*

Lessor's Solicitors. For preparing, settling and completing lease and counterpart.

Where the rent does not exceed £100 : £7 10s. per cent. on the rental, with a minimum of £5.

Where the rent exceeds £100 and does not exceed £500 : as above, with an addition of £2 10s. in respect of each subsequent £100 of rent.

Where the rent exceeds £500 : as above, with an addition of £1 in respect of each subsequent £100 of rent.

Lessee's Solicitor. For perusing draft and completing, one-half of the amount payable to the lessor's solicitor.

Note : There is a custom in London and some other parts of the country which requires a lessee to pay the charges of the lessor's solicitors as well as his own.

3. *Scale of Costs Allowed in Regard to Registered Titles.*
(Now subject to an increase of 50%).

Vendor or Purchaser's Solicitor.

15s. per cent with a minimum of £1 10s. for the first £1,000.

10s. per £100 for the second and third £1,000 of purchase price.

5s. per £100 for the fourth and fifth £1,000 of purchase price.

4s. per £100 for each subsequent £1,000 up to £10,000.

2s. per £100 for each subsequent £1,000.

Fees are payable to the Land Registry on a sliding scale additional to the legal charges.

HOW TO BECOME A LAWYER

Johnson observed that "he did not care to speak ill of any man behind his back, but he believed the gentleman was an Attorney".

Boswell, *Life of Johnson*

BOTH branches of the legal profession in England—viz., barristers and solicitors—are open equally to men and women. Barristers are treated as the senior branch of the profession, and they have more glittering prospects than solicitors, for Judges are always appointed from their ranks. Barristers are also qualified to accept many high political appointments, including those of the Attorney-General and the Solicitor-General, the two principal legal officers of the Crown. Only a few comparatively insignificant official appointments are open to solicitors.

The principal function of barristers is to plead cases in Court. As ancillary thereto, it is the practice for them to advise on legal problems of particular complexity, and to settle the formal documents called 'pleadings', which are prepared in every action, and which set out the facts relied upon by each of the parties to the suit, so as to define the issues to be tried.

In order to become a barrister it is necessary to pass certain legal examinations, and also to become a member of one of the four Associations, called Inns of Court. They are Gray's Inn, Lincoln's Inn, Inner Temple and Middle Temple, and they were all founded many centuries ago. Their affairs are administered by Senior Barristers called 'Benchers'. When a student joins his Inn, he must keep six terms before he may sit for his final examination. There are four terms or 'Sittings' in each year; Michaelmas Term runs approximately from October to Christmas; Hilary Term from January to Easter; Easter Term from Easter to Whitsun; and Trinity Term from Whitsun to the end of July, when the Long Vacation starts. A student keeps a

term by dining six times in the Hall of his Inn, although a University student need only dine three times each term. It is also usual for a prospective barrister to pay a substantial sum to study in the office, or 'chambers', as they are called, of a practising barrister. This, however, is not obligatory.

Farington in his diary (Nov. 17th, 1797), reports an occasion when '16 Benchers dined to-day in the Inner Temple Hall—about 30 Barristers and Students—The Benchers have a table covered with luxuries—They pay only 1/6 each. . . .—No Vegetables are allowed to Roast meats. They are paid for separate. Port wine is charged 3/6 a bottle.' A student should not rely upon finding similar conditions to-day.

When the necessary dinners have been eaten, the final examinations must be taken and passed, after attending the Inns of Court School of Law. Thereafter the student must keep six further terms before he is qualified to be 'called' to the Bar, subject to the proviso that he is only required to keep an aggregate of 12 terms, and when this has been done he may appear professionally in any Court. A barrister frequently devotes himself to some special branch of the law. If his particular choice is the Common Law, he will usually appear in the King's Bench Division, and if he has specialised more particularly in matters of Equity, he will usually be seen in the Chancery Courts. Almost every chapter in this book has dealt with a subject on which a barrister may wish to specialise, but in whichever Court a barrister practises, he has no direct contacts with his lay client, and it is this feature which robs the work of much of its human interest: All his work must come to him through a solicitor. He is not even permitted to interview the client, except in the presence of his solicitor.

When a barrister receives instructions from a solicitor he is said to receive a brief, but he may have to wait a long time for his first brief, for, like a solicitor, he is never allowed to advertise for work. There are also strict rules of etiquette which govern his relations with solicitors, and

he is not permitted to visit a solicitor in the solicitor's office, unless he is doing so in respect of his own personal affairs.

After a barrister has practised for ten years as a Junior Counsel, he is entitled to apply to be made a King's Counsel, or to take 'Silk', as it is called. King's Counsel are regarded as the leaders of the profession, and the Judges are usually appointed from their ranks.

Although the ultimate prospects open to a barrister are virtually unlimited, only a few are outstandingly successful. The most desirable qualifications for a good barrister are a capacity for hard, concentrated work, a crystal-clear mind, an ability to seize on the essential points in an argument, a ready wit, and ease of expression. Needless to say, a pleasant personality is also an asset, as in every other profession or business. A barrister usually remains a member of his Inn for the whole of his life, and he may be disbarred for grave offences.

Even when he is possessed of the necessary attributes, a barrister is by no means assured of success. The commencement of his career is inevitably an uphill struggle. Briefs do not fall like manna into the chambers of an unknown barrister. If he has connections among solicitors, he is, of course, more likely to receive briefs, and a young prospective barrister who, perhaps, knew his Gilbert and Sullivan, was recently heard to observe that he always believed in courting the daughters of solicitors! However, even this will not avail him, if he is not able to turn opportunity to his advantage by skill and ability.

Three years' training, followed by a further protracted period of waiting for briefs, during which he still continues to earn nothing, is not a cheerful prospect. You will not be wise to contemplate the career of a barrister, therefore, unless you have ample resources, and a private income sufficient to keep you from starvation during the lean years. There is scarcely such a thing as 'taking a job' when you have passed your final examination. A few lucky barristers, who devote themselves to theory, may obtain work from legal

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publishers, but for the rest they must rely upon their own skill and ability to obtain briefs.

Although it is the practice for a number of barristers to share chambers, partnership or anything resembling partnership is not permitted. Crumbs may, however, from time to time fall into the lap of a young barrister who shares chambers with a busy junior with more work than he can digest. In these conditions, a fledgling may receive one of the briefs sent to the busy junior, and he is then said to 'devil' for him. This practice is not so prevalent as formerly. Most solicitors prefer to know the qualifications of the barrister who is to appear for them in Court. They do not like their cases to be conducted by a fledgling. If the Counsel who has received the brief is too busy to attend to it, the solicitor prefers to choose his own substitute. In normal times the supply of keen barristers exceeds the demand, and most solicitors usually know a number of competent juniors.

The work of a solicitor is of a totally different character from that of a barrister, although many of the essential qualifications are similar. A solicitor must also be prepared to work hard, and he will usually only be successful in his profession if he is conscientious and ready to put the interests of his client before his own.

Every prospective solicitor must enter into 'articles of clerkship' with a practising solicitor before he can start his career. The consent of the Law Society must also be obtained before he may enter into his articles. The normal term of articles is five years, but this period is reduced to four and a half years when a student has obtained Matriculation or has passed other specified examinations, subject to certain conditions. The period is further reduced to four years when a student has taken certain courses at a recognised Law School, and to three years if he has taken a degree at a British University.

Before he is able to make a start, a student must, of course, find a solicitor who is willing to give him his articles, and a premium of £300 or more is sometimes required for this

privilege. Moreover, the clerk must not expect to receive any remuneration during the period of his articles, if he has come straight from School or University. It is, however, becoming increasingly frequent for solicitors' clerks to enter into articles with their principal after they have had ten years' practical experience of the law, and they may then qualify after three years' articles. It is not unusual for a solicitor to offer a competent clerk free articles in such circumstances, whilst the solicitor will also continue to pay the clerk his usual salary during his articles.

Three examinations must normally be taken: The first is a preliminary or general knowledge examination, and there are a number of instances in which exemption may be claimed in respect of the 'Prelim.' The Intermediate Examination tests the progress which a student has made in general legal knowledge, and also includes Book-keeping and Accounts. The Final Examination is decidedly 'stiff', and questions are asked which range over the whole field of law. A high standard is required in all these examinations, and the percentage of failures is substantial, amounting to over 35% at the last Final Examination results published in August 1946.

In addition to the premium on the articles, there is considerable expense involved in becoming a solicitor. The Stamp Duty payable on articles is £80, and the examination and tuition fees may amount to a further £50. After qualifying, a fee of £25 is payable for a certificate which admits the applicant to the Roll of Solicitors, and permits him to practise. Thereafter, it is necessary for every solicitor to take out an annual practising certificate. This costs £4 10s. in London and £3 in the country, during the first three years of admission, and double these amounts in each subsequent year. In addition, there is the contribution of £5, which every established solicitor is required to make annually to the Compensation Fund referred to in Chapter 32, and it is always advisable for a solicitor to become a Member of the Law Society, even although this is not compulsory. Membership of the Society costs £3 3s. a year for London members and £1 11s. 6d. a year for country members.

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These heavy expenses will suggest that every boy and girl should seriously consider the prospects, before deciding to enter into articles, even if keen on the law. He (or she) will usually do better to obtain a post as a junior clerk in the office of solicitors of repute. Good work is usually appreciated in such an office, and there is nothing derogatory in starting on the bottom rung of the ladder. A diligent clerk who wishes to qualify as a solicitor at a later date, can usually do so without financial strain, for the reasons which have been explained. Parents may make a useless sacrifice when they insist upon their son entering into articles as soon as he leaves school, because they think he will then have a chance in life which they themselves never enjoyed. Of course, they will usually have no difficulty in placing him in articles, if he has intelligence. They may even find a solicitor ready to give him articles without payment of any premium. When, however, he has qualified, at heavy expense, he will still be at the bottom of the ladder. A newly admitted solicitor, without practical experience, will usually command a salary lower than a clerk with several years' practical experience. It is vanity to make a boy a solicitor, unless he has real prospects of being able to build up a practice on his own clientele, when he is admitted into the profession.

Although the higher judicial posts are not open to solicitors, there are other compensations. If you have a real interest in law and the administration of justice, every day has its own interest. Some aspects of the law are, of course, more interesting to the theorist than to the practical man. Conveyancing or the transfer of property does not offer the same excitement as litigation. On the other hand, you may not like excitement, and there are many other fields open both to the practical man and the theorist.

Solicitors must be men of integrity. The high degree of responsibility which attaches to the profession is recognised by the fact that a solicitor is an 'officer of the Court'—*i.e.*, the High Court. For practical purposes this means that the Court is his governing authority, although control is now usually exercised by the Law Society, some of

whose extensive powers were considered in Chapter 32. As large sums of money may be daily passing through the hands of solicitors, strict regulations have been laid down relating to solicitors' accounts, and they are designed to avoid lax methods which can so easily lead to dishonesty. Every solicitor is obliged to keep his clients' money in a separate banking account, and not to mix it with his own or his office funds. He is also obliged to keep proper books of accounts, and if complaint is made to the Law Society of default by a solicitor in respect of any financial transaction, the Society has power to investigate his books and to require him to attend to answer complaints. If found guilty of professional misconduct, the Society may impose penalties, suspend him from practice, or even strike his name from the Rolls.

It is, perhaps, necessary to add that whilst it places him under this strict discipline, the law is also zealous of his rights, and it is not only an offence for any layman to hold himself out as a solicitor, but it is also an offence for any unqualified person to prepare a deed, as distinct from an agreement, for reward.

A final word of advice to a prospective solicitor—male or female. If you are leaving school and are attracted by the prospect of discovering whether the iron curtain which is supposed to separate the law from the layman is or is not only a blind, don't rush into articles, but ascertain first whether your interest in the law is of a passing, or of an enduring character. If you seek employment as a junior clerk with a firm of repute you can leave your job without harm to yourself or to anyone else, if you find that you can't 'stick' the law. On the other hand, if you want to stay the course you will already have made a start. Given a fair share of good fortune, you will have started a career which holds out prospects sufficient to satisfy all but the most exacting ambitions, and at the same time you will have the opportunity, if you are conscientious, of being of real service to the community.

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APPENDIX 1

EQUITY

WHILST the Common Law of England was largely built up by the application of common-sense, the early English Courts had very limited powers, and they could only be exercised according to fixed rules, for all legal procedure was rigid and inflexible. If a man suffered a legal injury, he could have no remedy at Common Law unless his request for redress could be prepared according to these strict rules. Generally speaking, they were framed upon the principle that money was a cure for every legal injury. Unless compensation was the foundation of a claim, there were few cases in which the Common Law had power to give it consideration.

The community, however, discovered in course of time that money was not the cure for all ills. There were many cases in which it did not yield the required remedy. If John Doe insisted upon a persistent infringement of his neighbour's legal rights, the neighbour would want to abate the nuisance, and an award of compensation would not achieve this end. This was not the only type of grievance which could not be remedied by the Common Law. There were many others, and in each instance the suitor had to look elsewhere for redress.

To meet this situation a practice arose of preparing a petition addressed to the King praying justice for the complaint. If this petition was presented in due form, it was handed to an official of the King's Court, called the Lord Chancellor. Although the law was administered by the Judges, they could not deprive the King of his supreme prerogative of doing 'equity'—*i.e.*, right or justice—to his subjects, and the Lord Chancellor was accordingly given power to remedy grievances. When the Lord Chancellor exercised these powers they were described as being 'equitable', as distinct from 'legal', because they were founded on 'equity' as distinct from 'law'. In course of time, more

and greater demands were made upon equity, and, as a result, it gradually introduced its own series of rules and set up its own Courts. Complications then ensued, and resulted in competition, fierce at times, between the rival Courts. Courts of Equity regarded themselves as superior to Courts of Common Law, as they claimed to be able to remedy any legitimate injury. For instance, equity invented the legal devices known as an 'injunction' and 'specific performance', both of which have been dealt with in the text, whilst it also took control of all disputes which arose out of trusts.

Some may think that equity sometimes used its powers maliciously, as although it could never directly overrule any decision of the Court of Common Law, it did have power to grant an injunction, in suitable cases, to restrain a litigant from continuing with his Common Law action. This state of affairs continued until the Judicature Act 1873. This Act fused the two systems, and merged all the Superior Courts of the country in the Supreme Court of Judicature. Justice is now administered as one whole, and equity is no longer able to make independent regulations to suit particular grievances, for it must only operate in strict accordance with Statute and precedent. On the other hand, the Courts still maintain what is termed their 'equitable jurisdiction', and although this is usually administered by the Chancery Division, its jurisdiction is not exclusive.

Equity has played an important part in the development of English law. To-day, when it has become assimilated into the legal system, a layman may go through life without feeling its impact. For example, if he acts as a trustee, and commits a breach of trust, an offence which would formerly have brought him into conflict with equity, he may now expect to feel the full weight of ordinary legal procedure brought to bear against him.

APPENDIX 2

JOHN DOE AND RICHARD ROE

'Jove and My Stars be praised! Here is yet a
Postscript.'

Twelfth Night.

'JOHN DOE' and 'Richard Roe', who figure so often in this work, are, as already stated, fictitious legal characters. This brief account of their life is involved, and unless you feel prepared for concentration, you may, accordingly, prefer to take their lives for granted, and to omit this postscript.

John Doe and Richard Roe originally appeared as plaintiff and defendant respectively in numerous lawsuits brought for the possession of property from the time of the Stuarts until the Common Law Procedure Act 1852 swept away one of the most extraordinary of legal fictions.

It happened in this way. In early days, the Courts only had power to adjudicate on disputes if they were instituted in accordance with set forms. Those which related to disputes regarding the ownership of property were of a most complicated and cumbersome nature. They were, moreover, so beset by traps, *e.g.*, a description of a garden as an orchard would be sufficient to throw the plaintiff out of Court, that they became too dangerous for the average litigant. There was, however, a less complicated procedure for settling disputes regarding ownership, if a claim of trespass was made under a lease. The Court could settle a dispute, either as between a landlord and a tenant, or between a tenant and a trespasser. Accordingly, if William claimed freehold land in the occupation of his neighbour Henry, but considered it too hazardous to bring proceedings against Henry to recover possession of the disputed land, he would grant a lease of the land to George, who would to-day be called a 'stooge'. It was George's function to make a token entry on the land, and to remain there until there was a trespass by a stranger, Charles

George, as tenant, would then start proceedings of ejectment against Charles, as trespasser. These proceedings might, of course, be taken without Henry's knowledge, but the Court required formal notice of the litigation to be served on any person actually in occupation of the disputed land, and in this way Henry would be informed of the action. Henry then had the right to apply to intervene in the suit, and he was permitted to do so, on condition that he admitted that George had actually entered on the land, under the lease granted to him by William, and that Charles had trespassed on the land. He was entitled, however, to dispute William's right to have granted the lease to George, and this plea made it necessary for William to prove his title to the land. If he was able to do so, it followed that Henry had no title to the land. Conversely, if William failed to establish his title, *he* had no right to the land. In this way the real issue as to the ownership of the land between William and Henry was decided by the Court.

In practice, the procedure was obviously most cumbersome and inconvenient, so an ingenious scheme was devised to enable a fictitious plaintiff to replace George, and a fictitious defendant to replace Charles. The former was called John Doe and the latter was called Richard Roe. In these proceedings John Doe claimed (1) that the freeholder, our friend William, the real claimant, had granted him, John Doe, a lease of the premises for a term of years; (2) that he, John Doe, had entered into possession of the premises under the lease, and (3) that the defendant Richard Roe had wrongfully entered on the land and ousted him from possession. When Henry, the rival claimant, was notified of these proceedings he was permitted to intervene in the suit, and to be substituted as defendant for Richard Roe on condition that he admitted (1) the fictitious grant of the lease to John Doe, (2) John Doe's fictitious entry on the land, and (3) the fictitious trespass by Richard Roe. He denied, however, that the grant of the lease was a valid lease, and would contend that the freeholder, William, had no title to grant the lease. This issue was thus decided between the

parties, as before, but without the necessity of actual lease, actual entry, or actual trespass.

And that was that! When John Doe and Richard Roe, like good old soldiers, faded away in 1852, after new and simplified legal forms had been introduced, they received no funeral oration. There were 'No flowers by request', but there are still a few lawyers who may say 'Thanks for the memory'.

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